TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 52

HUBERT DALTON AND FLORENCE W. DALTON, PETITIONERS,

vs.

FRANK C. BOWERS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF FRANK K. BOWERS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1932

CERTIORARI GRANTED MAY 31, 1932

(36,725)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 11, 1932.

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IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

L. 44, Page 216

HUBERT DALTON and FLORENCE W. DALTON, Plaintiff-,

against

FRANK C. BOWERS, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the 2nd District of New York, Defendant

STATEMENT UNDER RULE 13

The above entitled plaintiffs Hubert Dalton and Florence Dalton commenced this action by serving a summons and complaint on the above named defendant's testator Frank K. Bowers Collector of of Internal Revenue for the Second District of New York on the 28th day of March, 1929, said summons and complaint having been filed on March 29th, 1929. On October 14, 1930, Frank K. Bowers died and on the 20th day of March, 1931 an order was entered substituting as defendant Frank Collis Bowers executor of the Last Will and Testament of Frank K. Bowers, deceased. On the 11th day of June, 1929, issues were joined and the defendant served an answer to the complaint which was [fol. 2] filed on June 11th, 1929. An amended complaint was served and filed on March 19, 1931 and an answer to the amended complaint was served and filed on March 19, 1931. The trial was had on March 19th and 20th, 1931 before Hon. Francis G. Caffey, Judge of the United States District Court and a jury of one. Judgment was entered on March 26, 1931 in favor of the plaintiff. On June 15, 1931, this appeal was taken.

In United States District Court, Southern District of New York

L. 44, Page 216

Hubert Dalton and Florence W. Dalton, Plaintiff-,

against

Frank K. Bowers, as Collector of Internal Revenue of the United States for the 2nd District of New York, Defendant

Summons

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty [fol. 3] days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 27th day of March, A. D. 1929.

Alex. Gilchrist, Jr., Clerk. Arnold Lichtig and Herbert A. Mossler, Plaintiffs' Attorneys, 141 Broadway.

Service of the within summons and attached complaint is hereby acknowledged.

Frank K. Bowers.

March 28, 1929.

[fol. 4] In United States District Court

[Title omitted]

Amended Complaint

Plaintiffs, by Arnold Lichtig and Herbert A. Mossler, their attorneys, for their amended complaint herein, allege:

For a First Cause of Action

1. That at all the times hereinafter mentioned, the plaintiffs were and still are residents and inhabitants of the City of Stamford, State of Connecticut.

2. Upon information and belief that Frank K. Bowers was subsequent to December 31, 1924 and until the date of his death hereinafter mentioned, the duly appointed and acting Collector of Internal Revenue of the United States [fol. 5] for the Second District of New York and was at all said times a resident and inhabitant of the State of New York for the Southern District of New York and within the jurisdiction of this Court.

3. Upon information and belief, that on or about the 14th day of October, 1930, the said Frank K. Bowers died a resident of the State of New York, New York County, leaving a Last Will and Testament which was duly admitted to probate by the Surrogates' Court of the County of New York, and on or about the 29th day of October, 1930, Letters Testamentary were duly issued by the said Surrogates' Court of the County of New York to the defendant Frank C. Bowers as Executor of said Last Will and Testament of Frank K. Bowers, deceased, and the said defendant Frank C. Bowers has duly qualified and is now acting as such Executor.

4. That at all the times hereinafter mentioned, and until June 26, 1925, the Dalton Manufacturing Corporation was a corporation duly organized and existing under and by virtue of the laws of the State of New York.

5. That the plaintiff, Hubert Dalton, during the year 1917 acquired one thousand (1,000) shares of the preferred stock and two thousand nine hundred fifty (2,950) shares of the common stock of the Dalton Manufacturing Corporation.

6. That the cost thereof to said plaintiff, Hubert Dalton, was and is the sum of Three hundred ninety-five thousand ($395,000) Dollars.

[fol. 6] 7. That on the 26th day of June, 1925, the Dalton Manufacturing Corporation was duly and legally dissolved in accordance with the then existing Statutes and Laws of the State of New York.

8. That at the time of the dissolution of the said Dalton Manufacturing Corporation said preferred and common stock thereof owned by the plaintiff, Hubert Dalton, was worthless and of no value.

9. That at the time of the dissolution of said corporation and on or about the 26th day of June, 1925, the plaintiff, Hubert Dalton, surrendered for cancellation his said shares of preferred and common stock of the Dalton Manufacturing Corporation then owned by him and the same was duly cancelled.

10. That no moneys or other consideration have been received by the plaintiff, Hubert Dalton, for said preferred or common stock or any part thereof, nor is said loss sustained by reason thereof, covered or compensated for to said plaintiffs by any insurance and said plaintiffs will not receive anything in the future therefor.

11. That the full cost to the plaintiff, Hubert Dalton, of said stock, both common and preferred, to wit, Three hundred ninety-five thousand ($395,000) Dollars was and is a total loss to said plaintiff.

12. Upon information and belief, that said loss of Three hundred ninety-five thousand ($395,000) Dollars was sus- [fol. 7] tained by said plaintiff, Hubert Dalton, during the year 1925.

13. That the plaintiffs duly filed with the defendant a joint return of their income ending December 31, 1925 and in said return made a deduction in the sum of $395,000.

14. That said deduction in the sum of $395,000 was on account of the loss sustained by the plaintiff Hubert Dalton by reason of the loss on said stock in the Dalton Manufacturing Corporation as hereinabove set forth.

15. That said deduction of $395,000 was disallowed.

16. That by reason of the disallowance of said deduction, there was assessed against the plaintiffs as additional income tax for the year 1925 the sum of Fifty six thousand eight hundred forty-one and 32/100 ($56,841.32) Dollars.

17. That the said Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District

of New York, pursuant to such assessment aforesaid, on the 10th day of September, 1928, exacted and collected from the plaintiffs under color of the provision of an Act of Congress of the United States approved June 2, 1924, effective as of January 1, known and cited as the "Revenue Act of 1924" the sum of Fifty-six thousand eight hundred forty-one and 32/100 ($56,841.32) Dollars as additional income taxes for the year 1925.

[fol. 8] 18. That at said time and place last mentioned, plaintiffs served written notice upon said Frank K. Bowers, that said payment was made under protest, duress and compulsion and solely for the purpose of avoiding the imposition of the penalties in said Act provided and the restraint of their goods, chattels and effects, reserving all their rights to recover said amount.

19. Upon information and belief, that the assessment and collection of said tax was and is erroneous, illegal and void as against the plaintiffs.

20. That thereafter and on the 16th day of November, 1928, the plaintiffs herein duly filed with and presented to said Frank K. Bowers, Collector, for transmission to the Commissioner of Internal Revenue of the United States at Washington, D. C., their claim for refund of said tax, in the sum of Fifty-six thousand eight hundred forty-one and 32/100 ($56,841.32) Dollars.

21. That said claim for refund was duly made and duly filed in the form and manner required by law and the regulations of the Secretary of the Treasury of the United States established in pursuance thereof.

22. That on or about the 15th day of February, 1929, the Commissioner of Internal Revenue rejected and disallowed said claim for refund and so notified the plaintiffs.

23. That said Frank K. Bowers as Collector of Internal Revenue of the United States for the Second District of [fol. 9] New York, by reason of the disallowance and rejection of said claim for refund by the Commissioner of Internal Revenue has refused and, at the time of the commencement of this action, still refused to refund to these plaintiffs the whole or any part of said tax.

For a Second Cause of Action

24. Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs marked "1", "2", "3", "4", "5", "6", "7", "8", "9", "10", "11" and "13".

25. That at all times herein mentioned and for a long period of years prior thereto, Hubert Dalton, one of the plaintiffs, was and still is an engineer and an inventor, engaged in the operation of the trade and business regularly carried on by him, of inventing and patenting new and useful ideas and improvements and promoting and marketing the articles manufactured under said patents through the instrumentalities of corporations which said plaintiff organized, supervised, directed, managed and financed.

26. That said Hubert Dalton in the operation of said trade and business, among other things, invented ideas and improvements and obtained patents thereon in his own name, organized and financed said Dalton Manufacturing Corporation to market some of said inventions and patented articles, paid in and acquired the entire capital stock thereof and loaned money to and otherwise financed said [fol. 10] corporation and supervised, directed and managed its operations.

27. That plaintiffs, in their said joint return of their income for the calendar year ending December 31st, 1925, deducted the said sum of $395,000 as a loss sustained by said plaintiff Hubert Dalton during the said year 1925.

28. That said deduction of $395,000 was disallowed by the Commissioner of Internal Revenue.

29. That the Commissioner of Internal Revenue determined that the said loss of $395,000 was a proper and allowable deduction to which the plaintiffs were entitled for the year 1924, and duly notified the plaintiffs thereof.

30. That the plaintiffs duly filed with the defendant a joint return for their income for the calendar year ending December 31st, 1924 and thereby returned a net income of $20,921.02.

31. That the Commissioner of Internal Revenue readjusted said joint return for the calendar year 1924 and deducted said loss of $395,000 from said returned net income of $20,921.02, leaving a loss of $374,078.98 for said year.

32. That by reason of said readjustment of said income tax return for the calendar year 1924, the plaintiffs sustained a loss for the calendar year 1924, of the sum of $374,078.98.

33. Upon information and belief, that the said loss was a net loss sustained in the operation of a trade and busi-
[fol. 11] ness regularly carried on by said Hubert Dalton, one of the plaintiffs.

34. That the plaintiffs duly requested the said Commissioner of Internal Revenue to carry forward said loss, as a net loss, to the year 1925 and to include the same as a deduction in their said joint return of their income for the calendar year ending December 31st, 1925.

35. That the Commissioner of Internal Revenue refused to carry forward said loss as a net loss and refused to deduct same from the plaintiffs' income tax returns for said year 1925.

36. That the Commissioner of Internal Revenue disallowed said net loss of $374,078.98 as a deduction in the joint income tax returns of the plaintiffs for the year 1925.

37. That the net income of the plaintiffs for the year 1925, as fixed, determined and adjusted by the Commissioner of Internal Revenue, without the consent of the plaintiffs, and over their objection and protest, was the sum of $291,702.31.

38. That by reason of the disallowance of said net loss of $374,078.98 as a deduction in the joint income tax returns of the plaintiffs for the year 1925, there was assessed against the plaintiffs an additional income tax for the year 1925, in the sum of $56,841.32.

39. That the said Frank K. Bowers, as Collector of In-
[fol. 12] ternal Revenue of the United States for the Second Dis-
trict of New York, pursuant to such assessment aforesaid, on the 10th day of September, 1928, exacted and collected from the plaintiffs, under color of the provisions

of an Act of Congress of the United States approved June 2, 1924, effective as of January 1, 1924, known and cited as the "Revenue Act of 1924" the sum of Fifty-six thousand eight hundred forty-one and 32/100 ($56,841.32) Dollars as additional income taxes for the year 1925.

40. That at said time and place last mentioned, plaintiffs served written notice upon said Frank K. Bowers, Collector, that said payment was made under protest, duress and compulsion and solely for the purpose of avoiding the imposition of the penalties in said Act provided and the restraint of their goods, chattels and effects, reserving all their rights to recover said amount.

41. Upon information and belief, that the assessment and collection of said tax was and is erroneous, illegal and void as against the plaintiffs.

42. That thereafter and on the 16th day of November, 1928, the plaintiffs herein duly filed with and presented and delivered to said Frank K. Bowers, Collector, for transmission to the Commissioner of Internal Revenue of the United States at Washington, D. C., their claim for a refund of said tax, in the sum of $56,841.32.

43. That said claim for refund was duly made and duly filed in the form and manner required by law and the regu- [fol. 13] lations of the Secretary of the Treasury of the United States established in pursuance thereof.

44. That on or about the 15th day of February, 1929, the Commissioner of Internal Revenue rejected and disallowed said claim for refund and so notified the plaintiffs.

45. That said Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York, by reason of the disallowance and rejection of said claim for refund by the Commissioner of Internal Revenue, has refused and, at the time of the commencement of this action, still refused to refund to these plaintiffs the whole or any part of said tax.

Wherefore plaintiffs demand judgment against the defendant for the sum of Fifty-six thousand eight hundred forty-one and 32/100 ($56,841.32) Dollars with interest

thereon from the 10th day of September, 1928, together with the costs and disbursements of this action.

Arnold Lichtig and Herbert A. Mossler, Attorneys for Plaintiffs. Office and P. O. address: 521 Fifth Avenue, Manhattan Borough, New York City.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED COMPLAINT

The defendant Frank C. Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York, by George Z. Medalie, United States Attorney for Southern District of New York, answering the amended complaint herein, alleges as follows:

First. Denies each and every allegation contained in the paragraphs of the amended complaint marked and numbered "12", "19", "25", "26", "33" and "41."

Second. Denies so much of paragraph of the amended complaint marked and numbered "14" as states that plain-
[fol. 15] tiffs sustained any loss on the surrender of their stock in 1925.

Third. Denies so much of paragraph of the amended complaint marked and numbered "36" as states that the loss therein referred to is a net loss.

Fourth. Denies so much of paragraph of the amended complaint marked and numbered "38" as states that an additional assessment was made for the year 1925 against the plaintiffs in the sum of $56,841.32, although defendant admits the assessment made against the plaintiff was in the sum of $50,000.46.

Fifth. Defendant admits each and every other allegation contained in the amended complaint not otherwise herein denied.

Wherefore defendant demands judgment dismissing the amended complaint herein, together with the costs and disbursements of this action.

George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for Defendant. Office and Post Office address: U. S. Courts and P. O. Bldg., Borough of Manhattan, City of New York.

[fol. 16] In United States District Court

[Title omitted]

Order Substituting Defendant—March 19, 1931

Upon the annexed stipulation, it is

Ordered that the summons and complaint in this action be amended by substituting Frank C. Bowers as Executor of the Last Will and Testament of Frank K. Bowers as Collector of Internal Revenue of the United States for the Second District of New York, in place of Frank K. Bowers as Collector of Internal Revenue of the United States for the Second District of New York, as defendant, without prejudice to the proceedings already had, and it is further

[fol. 17] Ordered that the pleadings be amended in accordance with separate stipulations to be entered into between the parties, without prejudice to calendar position.

Francis G. Caffey, U. S. D. J.

In United States District Court

[Title omitted]

Stipulation re Substitution

It is hereby stipulated that the summons and complaint in this action be amended by substituting Frank C. Bowers as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York, in place of

Frank K. Bowers as Collector of Internal Revenue of the United States for the Second District of New York, as defendant, without prejudice to the proceedings already had [fol. 18] and that an order to this effect may be entered by either party without further notice.

Dated New York, March 19, 1931.

Arnold Lichtig and Herbert A. Mossler, Attorneys for Plaintiffs. George Z. Medalie, Attorney for Defendant Frank K. Bowers, as Collector, etc., and for Frank C. Bowers, as Executors, etc.

In United States District Court, Southern District of New York

Hubert Dalton and Florence W. Dalton, Plaintiffs,

against

Frank C. Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York, Defendant

Judgment

The issues in this action having duly and regularly come on for trial (the original defendant, Frank K. Bowers, as [fol. 19] Collector of Internal Revenue of the United States for the Second District of New York, having died after the institution of this action, and the defendant above named, Frank C. Bowers, as executor of the Last Will and Testament of said Frank K. Bowers as such collector, having been duly substituted as a defendant in place of the original defendant in this action without prejudice to proceedings already had, and the summons and complaint in this action having been duly amended accordingly by an order of this court dated March 19, 1931, and duly entered in the office of the Clerk of this Court, and the said defendant Frank C. Bowers, as such executor aforesaid, having duly appeared and answered the complaint herein), and the evidence of the respective parties having been adduced and the issues duly tried before Hon. Francis G. Caffey, United States District Judge, and a jury, at a trial term of

this Court held on the 19th and 20th days of March, 1931, at the Courthouse in the United States Court and Post Office Building, Broadway and Mail Streets, Manhattan Borough, New York City, and the plaintiffs having duly appeared by Arnold Lichtig and Herbert A. Mossler, their attorneys (Arnold Lichtig, Esq., of counsel), and the defendant having duly appeared by Hon. George Z. Medalie, his attorney (Leon E. Spencer, Esq., of counsel), and the parties having duly stipulated to try this case before the court and a jury of one and having further stipulated that at the close of the entire case each party would move for a direction of a verdict in its favor, and the issues having been duly and completely tried, and the court having on [fol. 20] the 20th day of March, 1931, duly directed the jury to find and return a verdict in favor of the plaintiffs and against the defendant for the sum of $56,841.32 with interest thereon from the 10th day of September, 1928, and the jury having found and duly returned its verdict accordingly, and the costs of the plaintiffs having been duly taxed and adjusted at the amount hereinafter set forth.

Now, on motion of Arnold Lichtig and Herbert A. Mossler, attorneys for the plaintiffs, it is

Ordered and adjudged that the plaintiffs, Hubert Dalton and Florence W. Dalton have and recover of and from the defendant Frank C. Bowers as executor of the Last Will and Testament of Frank K. Bowers as Collector of Internal Revenue of the United States for the Second District of New York, the sum of $56,841.32 with interest thereon at the rate of six (6%) per cent per annum from September 10th, 1928, according to law, together with $30.00 costs as taxed, amounting in all to $56,871.32 with interest thereon as aforesaid, and that the plaintiffs have judgment and execution therefor.

Judgment signed this 26th day of March, 1931.

Charles Weiser, Clerk of the United States District Court for the Southern District of New York.

[fol. 21] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

HUBERT DALTON and FLORENCE W. DALTON, Plaintiffs,

v.

FRANK C. BOWERS, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York

Defendant's Bill of Exceptions

Before Hon. Francis G. Caffey, J., and a Jury of One

New York, March 19, 1931.

APPEARANCES

Arnold Lichtig, Esq., and Herbert A. Mossler, Esq., for the Plaintiff, by Mr. Lichtig.

George Z. Medalie, Esq., United States Attorney, for the Defendant, by Leon E. Spencer, Esq., Assistant U. S. Attorney.

STIPULATION AS TO TRIAL

It is stipulated by and between the attorneys for the respective parties hereto that this case may be tried by a jury [fol. 22] of one, and at the conclusion of the trial each side will move for a direction of a verdict in its favor.

Mr. Lichtig: With respect to the pleadings in the case, which as just stated, were amended this morning, with particular reference to paragraph 14 of the amended complaint, I understand that the defendant admits that the loss of the $395,000 was sustained by the plaintiff, Hubert Dalton, but merely denies that that was sustained in the year 1925.

Mr. Spencer: Yes, sir, that is substantially correct. This case turns somewhat on whether the loss was sustained in 1924 or 1925. As the paragraph is worded here, I do not want to make any admission as to whether it applies in 1924 or 1925.

The Court: It is claimed by the year?

Mr. Spencer: Both. They claim if it is not one, it is the other.

The Government denies he sustained a loss at all; denies that he sustained a net loss at all. The pleadings were amended for the purpose of putting in the alternative request that if the Court found the taxpayer did not have a loss in 1925, he was entitled to a loss in 1924. I do not want to admit that there was any loss in 1924 or 1925 or that there was in any event a net loss.

[fol. 23] HUBERT K. DALTON, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lichtig:

Q. Mr. Dalton, in the years 1924 and 1925, what was your business or occupation?

A. Inventor and designer.

Q. What else, Mr. Dalton?

A. For making articles that I invented and promote companies to sell articles that I made.

Q. Are you also an engineer?

A. Yes.

Q. Where did you receive your technical education in engineering, Mr. Dalton?

A. Case School of Applied Science, Cleveland, Ohio.

Q. Are you a charter member of the Automotive Engineers of America?

A. Yes.

Q. How long have you been a member there?

A. Twenty-three or twenty-four years.

Q. Were you also elected to membership in the American Society of Mechanical Engineers?

A. Yes.

Q. But you did not consummate your membership?

A. Yes.

Q. How long ago, Mr. Dalton, did you begin your apprenticeship as an engineer and inventor?

A. Thirty-five years.

The Court: Thirty-five years?
The Witness: Yes.

Q. Prior to 1903, were you employed by Chandler & Price Manufacturing Company, manufacturers of printing presses?
A. Yes.
[fol. 24] Q. Was your employment for the purpose of perfecting printing presses upon which the company was then working?
A. Yes.
Q. You were employed to create new ideas in connection with the printing presses at that time, is that correct?
A. Yes.
Q. In 1903, do you recall whether you invented the multiple drilling machine?
A. Yes.
Q. That was used for what purpose?
A. Machine manufactured for the Binghamton Ice Machine Company.
Q. In 1903, were you employed by the Western Mott Company of Utica?
A. I was.
Q. And was your employment there to perfect devices to reduce the cost of manufacturing?
A. Yes.
Q. You *are* an employe of that company?
A. Yes.
Q. Did you receive any stock?
A. Later.
Q. What was your official position there, Mr. Dalton?
A. Factory manager and later I was made vice president of the company.
Q. In 1906, the Western Mott Company moved its plant to Flint, Michigan, is that correct?
A. Yes.
Q. Were you assigned to the task of supervising the building of the Buick automobile plant and factory at Flint, Michigan?
A. I was. The first thirteen factories of the Buick Company in Flint I built.
Q. The Western Mott Company had been absorbed by the General Motors Company about 1906, is that correct?
A. Yes.

Q. You then entered the employ of the General Motors, I think you told me, as construction engineer?

A. That is right.

[fol. 25] Q. In that connection you supervised the building of the Oakland and the Pontiac automobile plant?

A. The power plants.

Q. In 1907, Mr. Dalton, the General Motors Company organized the Oak Park Power Company as one of its subsidiaries, and made you vice president and general manager?

A. Yes.

Q. And chief engineer, is that right?

A. Yes.

Q. And you had charge of the power plant and full supervision of it?

A. I did.

Q. In 1909, you severed your connections with General Motors Corporation and accepted employment as chief engineer of the Flint Wagon Works at Flint, Michigan?

A. I did.

Q. In 1910 you and Mr. Whiting organized the Whiting-Dalton Company to develop the Dalton automobile?

A. I did.

Q. Did you invent and design the Dalton automobile?

A. I did.

Q. Did you invest any money in that company?

A. About $35,000.

Q. What interest did you receive in it?

A. One-half.

Q. When was that business given up?

A. A year later, a year or fourteen months later.

Q. In 1912 you came to New York and associated yourself with the Frevert Machinery Company?

A. I did.

Q. And during the period of your association there am I correct when I state that you invented the Dalton Lathe?

A. I did.

Q. Did you during that period of time actually work on developing it?

A. Yes.

Q. That brings us now to 1914. In 1914, did you organize the Dalton Machine Company under the laws of New York?

A. I did.

[fol. 26] Q. Who owned all the stock of that company?
A. I did.
Q. Paid for it all?
A. I did.
Q. What officer were you in that company?
A. President and treasurer.
Q. Who were the other officers and directors?
A. Mr. Whiting was one for a short time. I do not know who the others were.
Q. Were the people financally interested or employes?
A. No one had any financial interest in that company but myself.
Q. And you were also a director of that company, is that right?
A. Yes.
Q. Did you organize that company for the purpose of developing the lathe which you invented?
A. Yes.
Q. Did you during the period of the life of that corporation create new ideas and improvements in connection with the Dalton Lathe?
A. Many.
Q. Now, in 1917, you organized the Dalton Manufacturing Corporation under the laws of the State of New York, is that correct?
A. Yes.
Q. Who owned all the stock of that company?
A. I did.
Q. What office did you hold in that company?
A. President and treasurer.
Q. Were you also a director?
A. Yes.
Q. Who were the other officers and directors? State whether they were interested persons, or employes?
A. Employes.
Q. Did anyone have any financial interest in the Dalton Manufacturing Corporation other than yourself?
A. No.
Q. Who was in charge of the affairs of the Dalton Manufacturing Corporation?
A. I was.

[fol. 27] Q. Who was in charge of promoting the Dalton lathe?

A. I was.

Q. Did the Dalton Manufacturing Corporation manufacture or sell or develop any articles other than those created or invented or patented by you?

A. Yes.

Q. What?

A. Small attachments like tools for turning and collets for holding the work, operating the machine, and things that you require with a machine.

The Court: I do not know whether the Dalton Manufacturing Corporation manufactured these attachments or merely sold them. Your question covered manufacturing or sale.

Q. Did Dalton Manufacturing Corporation manufacture only the articles invented, created or patented by you, is that correct?

A. That is true.

Q. But in connection with the manufacture and sale of these articles themselves, it also sold some small incidental tools?

A. Yes.

Q. They were not manufactured by the Dalton Manufacturing Corporation, were they?

A. No.

Q. Those were only a very insignificant part of the business?

A. Not one per cent.

Q. Did I understand you to say that you were the directing head of the Dalton Manufacturing Corporation?

A. Yes.

Q. As well as the Dalton Machine Company?

A. Yes.

Q. Now, in 1924, or 1925, you organized the Dalton Tool Corporation, under the laws of the State of New York?

A. Yes.

[fol. 28] Q. Did you own all the stock of that company?

A. I did.

Q. Did you contribute all of the capital to that company?

A. I did.

Q. Was anyone else financially interested in that company other than yourself?

A. No.

Q. Did the Dalton Tool Corporation manufacture any articles excepting those invented, created or patented by you?

A. No.

Q. Will you tell his Honor what you did with respect to conceiving ideas, experimenting and making drawings, models for patents, or trying to obtain patents over the period of thirty odd years, concerning which you have testified? Do not give us the details, just state generally what you did?

A. I would conceive an idea of something that I thought might be of use. I would generally make a drawing of it first, and afterwards it was blueprinted, then have a model made and patterns, and then make up the model. If it appeared to be satisfactory, I would then make it up into a full sized machine.

Q. Then you would apply for a patent?

A. Then apply for patents. Sometimes I applied for patents before I had completed the full sized machine. When I found the model was working satisfactorily, I would make application for patent then.

Q. Would you apply for patents in the United States and also many foreign countries?

A. Yes, Germany, France, Italy and Japan.

Q. Who paid expenses of conceiving these ideas, the experimental work, the drawings, the models and application for patents and the obtaining of these patents?

A. I did.

[fol. 29] Q. Personally?

A. Yes.

Q. I show you here, Mr. Dalton, a schedule of the various patent applications which you filed, embracing the new ideas and improvements which you made, the date when you filed the patent applications, serial number assigned to it, the date the patent was granted, if it was granted, and the patent number, if one was allowed (handing to witness)?

A. These are at least some of them.

Q. Were there more besides those set forth on this list?

A. I could not tell. This is the first time I saw the list. I recognize all of those there.

Q. That was prepared by Mr. Becker, your accountant?
A. Yes.
Q. This list represents, at least in part, the various ideas of yours for which you filed application for patents, is that correct?
A. That is correct.

Mr. Lichtig: May I offer this in evidence.
The Court: Received as exhibit 1.

(Marked Plaintiff's Exhibit 1.)

Q. When you organized the Dalton Manufacturing Corporation in 1917, did you assign some patents to that corporation?
A. Yes.
Q. What was your object in doing that, Mr. Dalton?
A. I planned to sell stock in the company.
Q. To the public?
A. To the public, yes.
Q. And under your plan, who was to get the benefit of that profit on the sale of the stock?
A. I would.
Q. It would go to you personally?
A. Yes.
Q. Now, this schedule marked Plaintiff's Exhibit 1, con-
[fol. 30] tains a partial list, at least, of applications filed by you for patents, are your own ideas, thoughts, and improvements, is that correct?
A. That is true.
Q. And the Dalton Machine Company and the Dalton Manufacturing Corporation and the Dalton Tool Corporation, which you organized, as testified by you, manufactured some of the articles covered by the patents referred to in this exhibit?
A. Yes.
Q. You had a home at Shippan Point, Connecticut, Mr. Dalton?
A. I still have.
Q. Over thirty years?
A. Yes.
Q. In your home did you equip and maintain a workshop or workroom?
A. I did.

Q. Just tell his Honor the kind of workshop you installed in your home?

A. As to the description, I would say it was a small sized workshop.

Q. What did you have in there?

A. Lathes, drilling machines, drill press, gas furnace, apparatus for doing brazing and soldering and full equipment for pattern making.

Q. Drafting table?

A. Yes, drafting table; drafting equipment.

Q. From your experience as an inventor and engineer, would you say that that was a fully equipped workshop?

A. It answered all my requirements. I would not say it was fully equipped. It was well equipped for my work.

Q. You did do your inventing and experimental work in that workshop?

A. Yes.

Q. Now, who paid the expenses of installing and maintaining that workshop?

A. I did.

Q. Personally?

A. Yes.

[fol. 31] Q. Do I understand you had that workshop since about 1920?

A. Yes, it was 1920 I started it.

Q. Did you work in that workshop on frequent occasions?

A. Yes, several hours a day.

Q. Including nights?

A. Yes.

Q. And holidays?

A. Yes, and sometimes on Sundays.

Q. In this workshop did you work on these various ideas and thoughts which came to you?

A. I did.

Q. You perfected some of them in the workshop?

A. Yes.

Q. And you made use of that workshop during the entire—during the entire time since 1920, is that correct?

A. Yes.

Q. Spending several hours a day, on the average?

A. Yes.

Q. For days you spent more than two hours?

A. Sometimes half of the night when I got interested in something.

Q. While the Dalton Manufacturing Corporation was in operation, do I understand that you had an office and workshop at 50 East 42nd Street, this city?

A. Yes.

Q. For how long, Mr. Dalton?

A. About two years.

The Court: Workshop and what?

Mr. Lichtig: Office.

Q. Did you there employ at your expense a draftsman?

A. I did.

Q. Did you there work on ideas, inventions, and work to improve and perfect the patents and applications which you had filed?

A. I did.

[fol. 32] Q. And about how much time did you spend there along that line of work?

A. Several hours a day.

Q. Did you, in that office, make any inventions with respect to submarines?

A. I did.

Q. What were those?

A. A combination machine tool. I sold a great many of them to the Government. The latest submarines are fitted with them. V-4, V-5 and V-6 have them on board.

The Court: What kind of machine?

The Witness: It is a machine that is used for keeping submarines in repair.

Q. That was your invention?

A. Yes.

Q. Have you got a patent on that?

A. Patented in several countries.

Q. And is that patent included on this list, exhibit 1?

A. Yes.

Q. During this period of over thirty years, when you say you first started inventing, did you devote a great part of your time to inventing ideas, improving patents, making new thoughts and promoting those ideas and patents?

A. Yes.

Q. Prior to 1925, about how many hours a day did you devote to that kind of work?

A. For how many years? 1912? 1912 to 1925, I gave the whole of my time to it.

Q. Do I understand you correctly that you have created new ideas, new improvements, to the extent of about one thousand during the thirty-five years that you have been inventing and promoting?

A. Fully that.

Q. I understand you to have testified here today that in organizing these three corporations, that you were inter- [fol. 33] ested primarily in perfecting the various models and patented articles so that the stock of the Dalton Manufacturing Corporation might later be sold by you to the public through bankers?

A. Bankers, or stock brokers, or some other source.

Q. And in organizing the Dalton Manufacturing Corporation you had the underlying thought in your mind?

A. Yes.

Q. And you were also interested in organizing that corporation and in making known to the public the various articles you patented, is that correct?

A. Yes.

Q. What was your reason for that, Mr. Dalton?

A. I believe it would be better for me to do it through the means of corporations rather than do it as an individual.

Q. Did you hope to get profits from the sale of these patents you sold, and your own stock in these various corporations?

A. I certainly did.

Q. You said it would be better for you to have these corporations. Did you mean by that it would be better so you would not be personally responsible for the debts of the corporation, or that it would look better to the trade in general to have business conducted by you through the intrumentality of a corporation?

A. Better for the business in general.

Q. In other words, the business of machinery, lathes and patented articles such as you invented and listed under schedule 1, you thought it would be better to have it in a corporate form?

A. Yes.

Q. Did you consider, yourself, the organization of these [fol. 34] corporations, and particularly the Dalton Manufacturing Corporation, as a branch or as a part of your own business?

A. Yes.

Q. As a means to an end, is that correct?

A. Yes.

Q. As an intrumentality of this business?

A. Yes.

Q. And were you for a period of about twenty years regularly engaged in the operation of the trade and business concerning which you have just testified?

A. I was.

Q. Did you have any other trade or business during that period?

A. None whatever.

Q. Are you still engaged in that same trade or business?

A. I am.

Q. Since 1925 you have continued inventing and patenting articles, have you not?

A. Yes.

Q. Among them you invented this new smoking stand?

A. Yes.

Q. And also a curtain holder?

A. Yes.

Q. And also a signal for railroads?

A. Yes.

Q. You applied for and obtained patents on all those things?

A. Not the signal for railroads. That has not come out of the Patent Office. The others did.

Q. And you filed an application for it?

A. Yes.

Q. As I understand you expected to make money yourself from these inventions and improvements and patents?

A. Yes.

Q. All these patents were issued in your own name, were they not?

A. Yes.

Q. You paid all expenses in connection with procuring those patents?

A. I have.

Q. And even during the time when the corporations were in existence?

A. Yes.

[fol. 35] Q. Now, after 1925, you also organized another corporation, did you not?

A. Yes.

Q. Known as the Dalton Thibault Corporation?

A. Yes.

Q. And that corporation is now engaged in the manufacture of your smoking stand invention and patent and your curtain holder patent, is that correct?

A. That is correct.

Q. And the four corporations which you organized, manufactured for you some of the articles which you had obtained patents upon?

A. All the articles.

Q. All the articles you had patented?

A. All the articles that I invented.

Q. They did not manufacture all those articles?

A. Those four corporations, yes.

The Court: What he means is that those corporations engaged in no other business except to manufacture the things that he had invented, that is what I understand.

The Witness: That is true.

The Court: That is what I understand him to say.

Q. And that company was, Mr. Dalton, bringing your patented articles before the public so that your patents would be valuable and the capital stock would be sold to the public?

A. Yes.

Q. That was what you had in mind, particularly when your organized the Dalton Manufacturing Corporation?

A. Yes.

Q. You deemed it essential, did you not, in view of the nature of the articles which you patented and invented, [fol. 36] to have these articles manufactured and brought before the public and large users so the articles would be known?

A. Yes.

Q. For that purpose, among others, you organized these corporations?

A. Yes.

Q. Do I understand you to say that you personally supervised and managed the affairs of these corporations and personally devoted your time to the supervision and manufacture of patented articles which these corporations manufactured for you?

A. Yes.

Q. You endeavored from time to time to sell some of your patents and some of your capital stock of these various corporations, did you not?

A. I did.

Q. You did not sell any of your personal patents?

A. No.

Q. You did not sell any of your capital stock?

A. No.

Q. You were engaged at one time on negotiations with the principal owner of the Waltham Watch & Tool Company with respect to the purchase of some of your patents and your stock in the Dalton Manufacturing Corporation?

A. Yes.

Q. And for that purpose you went to Boston and saw him on several occasions?

A. Yes.

Q. And you were in touch with him by correspondence regarding them?

A. Yes.

Q. But that deal never materialized?

A. No.

Q. You also went to Worcester, Massachusetts, with the same purpose and idea?

A. Yes.

Q. And you continued negotiations there by correspondence?

A. Yes.

[fol. 37] Q. With respect to the sale of some of your patents, and the capital stock of the Dalton Manufacturing Corporation?

A. Yes.

Q. Those negotiations did not materialize?

A. No.

Q. You also corresponded, as I understand, with various concerns in England regarding the sale of the English patent rights, is that right?

A. Yes.

Q. And you conducted extensive negotiations through your representative in England for that purpose?

A. Yes.

Q. Do you remember how many firms were interviewed or corresponded with in England with a view of purchasing your English patent rights, about how many?

A. Probably ten or twelve.

Q. And your office at 50 East 42nd Street which you maintained for two years, did you personally pay all the running expenses of that office, including rent?

A. I did.

Q. The hiring of draftsmen?

A. I did.

Q. Employment of a secretary to take charge of your personal affairs?

A. I did.

Q. Telephone?

A. I did.

Q. Light, and so forth?

A. Yes.

Q. Now, in whose name was the lease of that office?

A. I could not recall that.

Q. Was it the name of the Dalton Manufacturing Corporation?

A. I could not recall that.

Q. But you personally paid the rent?

A. Yes.

Q. Did you provide all the funds that were needed by the Dalton Machine Company, the Dalton Manufacturing Company and the Dalton Tool Company;

A. I did.

[fol. 38] Q. Your personal funds?

A. Yes.

Q. Mr. Dalton, you are a man of large means, are you not?

A. Not very large.

Q. You are a man worth considerably over several million dollars, are you not?

A. Yes.

Q. Can you refresh your recollection from this paper and tell us how much money you loaned personally to the Dalton Manufacturing Company from January 1, 1920, to De-

cember 31, 1924, giving the amount loaned by you in each year (handing witness).

A. These items were taken by my certified accountant from the books. I would say that that is correct.

Q. Can you then state how much money you personally loaned to the Dalton Manufacturing Corporation in 1920?

A. 1920?

Q. Yes? You can refresh your recollection if you want to, Mr. Dalton.

A. I was going to say over $200,000. It was $216,693.91.

Q. In 1921, how much did you loan?

A. $182,299.99.

Q. And in 1922?

A. $43,539.32.

Q. And in 1923?

A. $42,331.20.

Q. And in 1924?

A. $30,238.63.

Q. Did you make those loans in one sum or in a number of advances during the course of each year?

A. A number of advances.

Q. Were those loans made by you to the Dalton Manufacturing Company at about weekly intervals?

A. Yes, sir.

Q. Now, in 1919, the corporation owed you a substantial amount of money, and you capitalized your previous loans to the extend of $145,000 and took stock of the company for that amount?

A. Yes.

[fol. 39] Q. And the balance of the advances which you made to the corporation the corporation still continued to carry on its books as loans, from you?

A. Yes.

Q. Or as advances?

A. Yes.

Q. Did you on frequent occasions advance the weekly payrolls for the various corporations because the corporations had no funds with which to pay them?

A. Yes.

Q. How frequently would you do that, about?

A. Whenever in need.

Q. About how often was that?

A. It is hard to answer.

Q. Was it frequently?

A. Quite frequently, yes.

Q. More than a dozen times a year?

A. Yes.

Q. More than two dozen times a year?

A. I can not recall just exactly.

Q. Now the Dalton Manufacturing Corporation borrowed money from the bank from time to time, did it not?

A. Yes.

Q. Did you personally guarantee the payment of those loans to the bank?

A. I did.

Q. Did you also endorse some of the notes of the corporation for moneys borrowed by them personally?

A. Yes.

Q. On occasions you also pledged your personal securities as security for the corporation loans?

A. Yes.

Q. Of the Dalton Manufacturing Corporation?

A. Yes.

Q. Did you also personally guarantee various purchases made by the Dalton Manufacturing Corporation?

A. I did.

[fol. 40] Q. Running into large amounts of money?

A. They involved large amounts, yes.

Q. Did you ever charge or receive any interest on any of the loans or advances which you made to the Dalton Manufacturing Corporation?

A. No.

Q. Did you ever ask for or receive any security for the various advances which you made to the Dalton Manufacturing Corporation?

A. No.

Q. I understand the Dalton Manufacturing Corporation owned real estate at Sound Beach, Connecticut, on which it borrowed from a local bank $50,000 secured by the bond and mortgage of the Dalton Manufacturing Corporation, is that correct?

A. Yes.

Q. Was it required as a condition for the making of that loan to the corporation by the bank the personal guarantee of repayment of that loan?

A. I endorsed that note.

Q. Did you on frequent occasions borrow moneys from your own bank and loan the proceeds thereof to the Dalton Manufacturing Corporation?

A. I did.

Q. Did you pay interest on the moneys which you borrowed from that bank?

A. I did.

Q. Did you charge or receive any interest from the corporation for any of these advances?

A. No.

Q. It happened frequently, as I understand it, that the notes of the Dalton Machine Company and the Dalton Manufacturing Corporation when they matured, the corporation had no funds to pay them and that you personally paid notes at the maturity, is that correct?

A. That is true.

Q. When the corporation had no funds, you personally paid the note?

A. Yes.

[fol. 41] Afternoon Session

HUBERT K. DALTON resumed the stand.

Direct examination (continued).

By Mr. Lichtig:

Q. When was the Dalton Manufacturing Corporation dissolved?

A. June 26, 1925.

Q. At the time the Dalton Manufacturing Corporation, or a short time prior thereto, owed various corporations money, did it not?

A. Yes.

Q. Were those creditors paid in full?

A. Yes.

Q. By whom?

A. I paid them.

Q. Personally, of your own funds?

A. Yes, I paid them out of my own funds and I turned that money over to the Dalton Manufacturing Corporation to send its checks.

Q. Your money was used to pay all the creditors of the Dalton Manufacturing Corporation?

A. Yes.

Q. Even though as to creditors to whom you were not obligated by endorsement or guarantee, is that correct?

A. Yes.

Q. Now, in 1922, the Dalton Manufacturing Corporation desired to borrow money from the bank. Do you recall that?

A. Yes.

Q. The bank asked for a statement of the assets and liabilities of the Dalton Manufacturing Corporation?

A. Yes.

Q. I show you this paper and ask you if that is a copy of the statement which the Dalton Manufacturing Corporation gave to the bank in December, 1922 (handing witness)?

A. I believe it is.

Q. In December, 1922, how much money did the Dalton [fol. 42] Manufacturing Corporation owe you for moneys which you advanced to them for their account?

A. Over $400,000.

Q. Can you refresh your recollection by the paper so as to give us the exact amount?

A. $436,179.30.

Q. What did the bank say to you about loaning money to the Dalton Manufacturing Corporation at that time, with particular reference to the indebtedness owing to you?

A. They would not let them have any money unless I waived my claim to it.

Q. The bank would not loan any money to the Dalton Manufacturing Corporation unless you agreed to subordinate your claim to the claim of the bank, is that correct?

A. That is true.

Q. Did you at the time agree to actually subordinate your claim of $436,179.30 to any claims of the bank?

A. I did.

Q. Did you so state on the statement given to the bank?

A. I did.

Mr. Lichtig:: I will offer this for identification.

The Court: Exhibit 2 for identification.

(Marked Plaintiff's Exhibit 2 for identification.)

Q. Did you, during the life of the Dalton Manufacturing Corporation, pay any expenses of that corporation out of your own funds without charging same to the corporation?

A. Yes.

Q. In a general way state what they were?

A. All traveling expenses and the securing of patents.

Q. Now, can you state the salaries which you received, [fol. 43] that you were supposed to receive from the Dalton Manufacturing Corporation, from 1917, as of its organization, to and including the year 1924, from your own memory?

A. I have no recollection of ever receiving any salary.

Q. Can you by looking at this statement state whether or not you received any moneys as salary for the period of time mentioned (handing witness)?

A. I have no recollection of having received this.

Q. In other words, no money was paid you as salary?

A. No.

Q. Do you recall whether or not your accounts were credited with any money as salaries?

A. Yes.

Q. Can you state the amounts for each of the years 1917 to 1924 inclusive?

A. 1917, $11,674. 1918, $10,794.94. 1919, $10,000. 1920, $7500. 1921, $7500. 1922, $2500. 1923, none. 1924, none.

Q. Those salaries were not paid to you, you say?

A. No.

Q. But were credited against the money which you advanced to the corporation, is that correct?

A. That is true.

The Court: You say they were added against the advances he made?

Mr. Lichtig: Am I wrong?

The Court: Added.

Mr. Lichtig: Added.

The Court: Added to the advances made.

Q. It was added to instead of credited. How much did your stock in the Dalton Manufacturing Corporation cost you?

A. The entire stock?

Q. Yes.

A. $395,000.

[fol. 44] Q. Did I understand you to say, Mr. Dalton, that you were regularly engaged in the same line of business that you testified to here today for at least twenty years?

A. Yes.

Q. Engaged in no other line of business except what you have testified today?

A. No.

Q. You entered into no business enterprises for profit except as you have testified during that period?

A. Yes.

Q. That is correct, is it?

A. Yes.

Mr. Lichtig: Paragraph 38. The facts are that the assessment was $50,000.46 and the interest on the assessment to the date of the payment was $6840.86, making a total of $56,841.32, which was the amount actually paid by the plaintiffs as additional taxes for the year 1925. Is that correct, Mr. Spencer?

Mr. Spencer: I presume that this figure of $6840.86 only covers interest. I am prepared to admit that the assessment against the plaintiff with respect to the calendar year 1925 was in the sum of $50,000.46. I am also prepared to admit that the total amount of taxes paid with respect to the year 1925 by the plaintiff was $56,841.32.

The Court: The date of the payment?

Mr. Lichtig:: That is not denied by the answer.

The Court: Usually counsel have no difficulty agreeing on the balance, after the main question is determined. If [fol. 45] agreeable, you may leave that until after the main questions are determined.

Mr. Lichtig: That is satisfactory and I thank your Honor for the suggestion.

We have computed the interest from the date of payment, which was September 10, 1928, subject to correction, to be $8611.38, making our total claim in this case $66,452.70.

The Court: Suppose you let that go on the record, subject to verification.

Mr. Lichtig: I offer in evidence Plaintiff's Exhibit 2 for identification (handing document to Mr. Spencer).

The Court: Very well, exhibit 2 admitted, subject to verification.

(Plaintiff's Exhibit 2 for identification received in evidence.)

Mr. Lichtig: That is all.

Cross-examination.

By Mr. Spencer:

Q. Mr. Dalton, I understand that you are an inventor and engineer?

A. Yes.

Q. That you have pursued that occupation for more than twenty years?

A. Yes.

Q. And during that time you have owned or controlled various corporations in which you were interested?

A. Yes.

Q. How many corporations have you been instrumental in organizing during your business career?

A. Six.

Q. When was the first corporation organized?

A. About thirty years ago.

[fol. 46] Q. And the Dalton Manufacturing Corporation was one of those six concerning which you were instrumental in organizing?

A. Yes.

Q. When was the Dalton Manufacturing Corporation organized?

A. I do not recall the exact date.

Q. Approximately in 1917?

A. 1917 I think it was.

The Court: That is the previous statement as I recall it, 1917.

Mr. Lichtig: That is a fact, your Honor.

Q. At the time the Dalton Manufacturing Company was organized, was there a predecessor corporation whose business you wound up?

A. Yes, sir.

Q. In other words, you had continuing corporations for similar purposes during a period of approximately thirty years?

A. No, not over a period of thirty years. Similar corporations ran over a period since 1912 or 1913.

Q. Were you an officer in all of those corporations?

A. Yes.

Q. When the Dalton Manufacturing Company was organized in and about 1917, did you purchase all of the outstanding capital stock of that company?

A. I did.

Q. And you continued to hold such stock without interruption from the date of the organization of the Dalton Manufacturing Company until you surrendered it for cancellation in June, 1925?

A. I did.

Q. From what sources did you receive your income during the years 1917 to 1924, inclusive? I am not asking for [fol. 47] the amount, just the general source of such income.

A. Stocks of my own; some from my wife.

Q. Do I understand that in each of those years you received income or a return upon your endeavors as an inventor or engineer?

A. I did not receive any income from my endeavors as an inventor during those years. That is, since 1914.

Q. Did you make several inventions subsequent to 1917?

A. I did.

Q. Have you at any time disposed of any of those inventions?

A. I have disposed of some now.

Q. Did you dispose of any during the period of the existence of the Dalton Manufacturing Company from 1917 to 1925?

A. No.

Q. Was your work during the period 1917 to 1925, inclusive, that of an experimental nature as an engineer?

A. Largely so, yes.

Q. Do I understand you to say that you received no income from any source other than the sources outside of your labors? In other words, was there any return for your labors, inventions, or acts as an engineer during the period 1917 to 1925?

A. Not a penny.

Q. Did you at any time during the period 1917 to 1924, inclusive, assign your interest or any part of it in any inventions which you had made to the Dalton Manufacturing Company?

A. Not until 1925.

Q. What time in 1925?

A. I could not tell you the exact date.

Q. I am interested in that, Mr. Dalton, because the Dalton Manufacturing Company was liquidated and finally dissolved in 1925.

[fol. 48] Mr. Lichtig: May I suggest that possibly Mr. Dalton has the years wrong. It was in 1917. He transferred some of the patents to the Dalton Manufacturing Corporation. He so testified before, and we handled the transaction, so I know the dates.

The Court: So I understand his testimony before.

Mr. Lichtig: That is the fact.

A. (continued). I had forgotten just the exact time.

The Court: He did assign some of the patents from the Dalton Manufacturing Company during 1917?

Mr. Lichtig: Yes.

Q. But not during any of the other years prior to 1925?

A. Not prior to 1925.

Q. Were you in active control of the Dalton Manufacturing Company during the period of its life, 1917 to 1924, inclusive?

A. I was.

Q. Were you an officer of that corporation?

A. President.

The Court: And treasurer.

The Witness: And treasurer.

The Court: And director.

Q. As such officer of the Dalton Manufacturing Company, where were your activities carried on?

A. Partly in New York and partly in Stamford, Connecticut, and partly in Sound Beach, Connecticut.

[fol. 49] Q. At the time that the Dalton Manufacturing Company was organized in 1917, what were its assets, roughly speaking?

A. I could not tell you exactly.

Q. You have not any idea as to the amount of the assets which the company had at the time of its incorporation?

A. All these records were made by a certified accountant, and he would be in better position to answer that question than I am.

Q. Is he here today?

A. He is here in court.

Q. And can you tell us from what source the assets of the Dalton Manufacturing Company were obtained, if there were any?

A. From what source?

Q. From what source, and my purpose of asking that question is to ascertain whether you assigned some of your interests to the Dalton Manufacturing Company in 1917, which constituted other assets?

A. I did, the interest in the Dalton Machine Company.

Q. In other words, the Dalton Manufacturing Company took over the assets of the Dalton Machine Company in 1917?

A. In a sense, yes.

Q. Have you any idea as to the source of the assets then from the tool and supply company?

A. They all came from me.

Q. For what purpose was the Dalton Manufacturing Company organized?

A. The manufacture of articles which I invented, and the placing of them on the market, and tried to sell stock in the company.

Q. I understand that for each of the years 1917 to 1924, inclusive, the Dalton Manufacturing Company manufac- [fol. 50] tured a great many articles that they sold to the public?

A. Yes.

Q. Is that right? They manufactured a good many articles that were sold to the public?

A. Yes.

Q. Were all the articles so manufactured directly connected with your inventions?

A. All of them.

Q. Did the Dalton Manufacturing Company, during any of the years 1917 to 1924, inclusive, produce articles for sale?

A. Yes.

Q. What was the nature of those articles?

A. Lathe tools, lathe dogs, lathe chops, lathe collets.

Q. When was the so-called successor to the Dalton Manufacturing Company organized?

A. The successor to it?

Q. I understand that in 1925 or thereabouts you were instrumental in the organization of another corporation?

A. The last of 1925.

Q. The last of 1925?

A. Yes.

Q. Did that company receive any assets from the Dalton Manufacturing Company?

A. No.

Q. That company was organized in 1925 and was organized for an entirely different purpose than the Dalton Manufacturing Company had been organized?

A. Partially, yes. They did not manufacture the same line of things that the Dalton Manufacturing Corporation did.

Q. That successor company was organized so that it could produce and sell articles to the public?

A. Yes.

Q. Can you tell us how you happened to wind up the affairs of the Dalton Manufacturing Company and organized a new corporation?

[fol. 51] A. In 1925, and the last of 1924, I am not sure just which, after the accountant had been over the things, I found that the company was rather badly involved and decided to wind it up.

Q. What do you mean by badly involved?

A. They owed considerably more money than they had assets.

Q. That had been the status of the company from the time of its incorporation?

A. I do not think so.

Q. Was there any time during the life of the corporation, 1917 to 1924, when the company had more assets than it had liabilities?

A. I cannot answer that by saying yes or no. If I took into consideration that I was not advancing, why, the company would have been.

Q. That is what I mean. In other words, in the years 1917 to 1924, if the company paid you or returned to you all the money which you had loaned to the company, it would be with insufficient funds to pay its obligations to you?

A. That is right.

Q. What portion of your time did you spend at the office of the Dalton Manufacturing Company in 1923?

A. In 1923?
Q. Yes.
A. Eight to ten hours a day.
Q. You were there practically every day?
A. Practically every day.
Q. Did that practice continue throughout 1925, or until the company was dissolved—1924, I beg your pardon.

The Court: Did that practice continue in 1924?
The Witness: Yes, very seldom less than five or six hours a day.

[fol. 52] Q. It is true that at the end of 1924 the Dalton Manufacturing Company had no assets whatsoever?
A. I did not know it until 1925.
Q. I state that supposition on my part because in your income tax return which you verified for the taxable year of 1924, you say at the end of the taxable year 1924, or on December 31, 1924, that there were no assets whatsoever, although there were outstanding liabilities. I understand that during 1922 and 1923, at least, the Dalton Manufacturing Company owned a plant at Sound Beach, Connecticut?
A. Yes.
Q. When was that plant obtained or purchased by the corporation?
A. We broke ground there in 1919. I originally owned the land, 7½ acres of ground.
Q. Did the Dalton Manufacturing Company construct a plant on that property in 1917?
A. Began work in 1919.
Q. How big or how large an operating force, how many assistants did you have in the operation of that plant? In other words, how many people were in the employ of the Dalton Manufacturing Company in each of the years from the date of incorporation to the end of 1924?
A. There was a time when we had 300 men.
Q. Approximately how many people were in the employ of the Dalton Manufacturing Company in 1917?
A. About 125 or 150.
Q. In 1918?
A. About the same.
Q. 1919?
A. Not quite so many.

Q. How about 1920?

A. In 1920, that is the year we had the most.

The Court: About three hundred.

[fol. 53] The Witness: Yes, I think about three hundred, all told.

Q. 1921.

A. It was a great slump in business, and we laid off. I do not think we had more than 75 or 80 men.

Q. That is during 1921?

A. Yes.

Q. How about 1922?

A. Probably the same number.

Q. 1923 probably the same number?

A. Yes.

Q. Were there any officers of that company other than yourself during any of the years 1917 to 1924?

A. If there were other officers?

Q. Can you tell us who those officers were?

A. Frank Miller; Miss Cohan; I can not recall who the others were. They were people who were in my employ.

Q. Did they assume or were they permitted to assume any directing status or managing status?

A. Only under my instructions.

Q. You never sold personally, did you, any merchandise which was manufactured by the Dalton Manufacturing Company?

A. Yes.

Q. During each of the years 1917 to 1924?

A. I would not say through each; for quite a number of years.

Q. Can you give us a general idea of what years you sold products of the Dalton Manufacturing Company to the public?

A. 1915 and 1916 I traveled all over the country.

Q. That was prior to the organization of the Dalton Manufacturing Company?

A. And through 1917 and part through 1918.

Q. But not after that?

[fol. 54] A. No, I could not say. I very seldom went away while I tried to sell goods.

Q. You have no recollection of having sold any of the products of the Dalton Manufacturing Company subsequent to 1919?

A. No, no specific time.

Q. When you obtained the outstanding preferred and common stock of the Dalton Manufacturing Company in 1917, did you pay into the coffers of the company a sum of money for the purchase of this stock?

A. I either paid in that time or had already paid in.

Q. You paid in some time during 1917 and received the stock?

A. Yes.

The Court: You actually did pay during 1917 some of it, and you may have paid after you got the stock, some time after?

The Witness: I could not recall whether I paid during 1917 and 1918, but all the stock that I had in my possession I paid for.

The Court: In other words, you paid for it in cash?

The Witness: In cash.

Q. And you are quite sure, are you, that you paid at least $395,000 for this stock?

A. I am.

Q. When you purchased the stock of the Dalton Manufacturing Company, what did you do with it? Did you simply put it in a safety deposit box and forget it, or did you make some effort to sell that stock to the public?

A. I made efforts to sell part and in one or two instances I tried to sell all of it.

Q. Did you ever place the matter in the hands of any brokers for the purpose of sale?

A. No.

[fol. 55] Q. In other words, your efforts were in a private way to dispose of the stock?

A. That is true.

Q. Did you have any offers for the stock?

A. Yes, I did have one.

Q. When was that?

A. About 1920.

Q. You did not have any offers after that time?

A. No.

Q. Did you make any effort to sell the stock after 1920?

A. Yes.

Q. There was considerable expense entailed in the development and perfection of your inventions?

A. On some of the machines, very much.

Q. Is it true that you used the company for the purpose of developing or improving inventions which you made?

A. Yes, it is.

Q. In other words, that may have been one of the purposes in organizing the corporation?

A. It was the purpose.

Q. In other words, if you had had no corporation under your control, you might have necessarily had to advance moneys for the perfection of your inventions, which you did not have to advance directly on the perfection of these inventions when they were manufactured by the corporations?

A. I would have no opportunity to dispose of the inventions unless I had some company to make them for me.

Q. I become rather interested in ascertaining from you whether the money you advanced to the corporation the Dalton Manufacturing Company, was money primarily intended for the development of your own capital, namely, the indebtedness which you had made?

A. No, all the money I advanced was for the promotion of the company and the advancement of the company.

[fol. 56] Q. The primary purpose was, however, to perfect the inventions which you had made?

A. The inventions were already perfected.

Q. By perfected, I mean the improvements which naturally would result from the manufacture and sale to the public.

A. I do not know if I get just exactly what you mean.

Q. Perhaps I haven't made myself clear. As I understand, in every invention the fundamental feature of it is perfected before the matter is placed in the hands of the public, or before it is manufactured and sold in those patents or those articles which the patents cover. In the evolution of things there are certain minor improvements or betterments made on the articles which are covered by the patents. In other words, every inventor must need to make improvements on the inventions which they are im-

proving for sale. Do I understand you to say that was the purpose for which the corporation was created?

A. Yes.

Q. Did the Dalton Manufacturing Company during any of the years in question make any profit at all from the manufacture or sale of articles?

A. I could not state that.

Q. You think perhaps your accountant could state it?

A. I think so.

Q. Of course, when you endeavored to sell the stock of the Dalton Manufacturing Company to private parties, you pointed out to them the fact that the company did not make any money?

A. I never misrepresented.

Q. I am just trying to get the complete picture. I am not saying that you did. You did not make a practice of purchasing articles and selling them to the trade, did you?

A. No.

[fol. 57] Q. In other words, in that respect the work of the Dalton Manufacturing Company differed from yours?

A. I do not see how it differed from mine at all.

Q. Perhaps I can make myself a little clearer. You have an entry on your various income tax returns, "merchandise bought for sale." In other words, indicating that the Dalton Manufacturing Company purchased from some third party merchandise which they subsequently sold. Can you give us any idea as to the general nature of that business?

A. I told you just a minute ago, dogs, chocks, collets. We made lathes; we could not make lathe chocks, and those things were a very small percentage of the actual work.

Q. The articles that were sold by the Dalton Manufacturing Company to the public were all applied, so to speak, to aid the articles you purchased from third parties?

A. That is true.

Q. Did the Dalton Manufacturing Company at any time return to you any part of the loans which you had made to it?

A. Never.

Q. In other words, the sum of $216,000 loaned to the company by you in 1920, was never returned?

A. Never.

Q. And in addition to that you received, in fact, no salary from the company?

A. No.

Q. I am not clear, Mr. Dalton, in my mind, whether on direct examination you stated exactly what patents were assigned by you to the Dalton Manufacturing Company in 1917.

The Court: In other words, you would like to have him identify each patent.

Mr. Spencer: I would like to have that, if it is possible to get it.

[fol. 58] The Court: Show him the list, Exhibit 1.

Mr. Lichtig: I have a memorandum of seven of them.

Mr. Spencer: There are only two on this one.

Mr. Lichtig: That is not a complete list.

Mr. Spencer: I would like to have something for the purpose of the record, to indicate what sort of patents were assigned to the company and when.

Mr. Lichtig: Counsel for plaintiff states that according to the information just given to him, the following patents issued to Hubert Dalton were assigned to the Dalton Manufacturing Corporation:

Patent No. 45,857, issued June 2, 1914;
Patent No. 45,858, issued June 2, 1914;
Patent No. 51,897, issued March 26, 1918;
Patent No. 1,114,124, issued October 20, 1914;
Patent No. 1,114,123, issued October 20, 1914;
Patent No. 1,230,128, issued June 19, 1917;
Patent No. 1,213,594, issued January 23, 1917.

Mr. Spencer: Off the record.

(Discussion off the record.)

Q. Will this refresh your recollection? I have no doubt about the accuracy of it, but I would like to have it supported by your testimony, if you can give it (handing witness)?

A. I believe that is correct.

[fol. 59] Q. In other words, the list which was just read off to the stenographer, was a correct list, of your own knowledge, of the patents that were assigned to the Dalton Manufacturing Company by you?

A. Yes, sir.

The Court: All of those could not have been assigned in 1917, because one of them was issued in 1918, although the application for the patent could have been assigned in 1917, and I suppose that is what did happen.

Mr. Lichtig: That is what did happen probably.

The Court That is common practice. That is probably what happened.

Q. Mr. Dalton, have you any information which would enable you to tell us whether or not the Dalton Manufacturing Company at any time used any of these patents in the production of manufactured articles?

A. Did they use them? That is what they did use, and nothing else.

Q. In other words, each of the patents was used for the production of articles which were sold by the Dalton Manufacturing Company to the public?

A. Yes.

Q. In other words, these patents are the basis on which the manufacture was conducted by you at the Sound Beach plant, Mr. Dalton?

A. Yes.

Q. Mr. Dalton, I show you this return and ask you if that is a copy of the income tax return of the Dalton Manufacturing Company for 1924 (handing witness). I am taking this now because it may turn out that the defendant puts [fol. 60] in no evidence except these papers.

A. To the best of my knowledge, that looks like a photostatic copy. This is the only one that has got a signature (indicating).

Mr. Spencer: I would like to put it in evidence for whatever it is worth.

Mr. Lichtig: I do not dispute that. No objection.

Mr. Spencer: If you have any objection because it is not certified, I will have it certified.

Mr. Lichtig: Your word is good enough.

Mr. Spencer: This is the 1924 Corporation income tax return of the Dalton Manufacturing Company.

The Court: Received as Exhibit A.

(Marked Defendant's Exhibit A, in evidence.)

Mr. Spencer: I would like now to offer in evidence the corporation income tax return of the Dalton Manufacturing Corporation for the calendar year 1923.

The Court: Any objection?

Mr. Lichtig: What is the purpose of 1923?

Mr. Spencer: It shows the financial status of the company during 1923. It is relevant to show that feature of it.

Mr. Lichtig: I must object to this as being irrelevant and immaterial. The only years in question are 1924 and 1925. The return of 1923 of the Dalton Manufacturing Corporation is immaterial in this action.

[fol. 61] The Court: I will receive it. I do not pass upon its effect. It is a statement made by a party to the litigation.

Mr. Spencer: I am stating here that at no time do I admit in what year the loss was. I do not want to pin myself down to 1924, although the Department is willing to grant a loss in 1924. The facts in evidence will show the status of the Dalton Manufacturing Company in the years involved.

The Court: Objection overruled. Exhibit B.

Mr. Lichtig: I respectfully except.

(Marked Defendant's Exhibit B.)

Mr. Spencer: I offer in evidence the individual income tax return of Mr. Dalton and Florence W. Dalton, plaintiffs, in this case.

The Court: What year?

Mr. Spencer: For the calendar year 1923.

Mr. Lichtig: I make the same objection, unless this evidence is for a limited purpose.

Mr. Spencer: The limited purpose, if I can limit it to any purpose, is that this corporation with the financial status was constructed by the Dalton Manufacturing Company. Their statements, exhibits are made a part of this return that is sworn to, and such various matters with respect to the Dalton Manufacturing Company during the year 1923——

[fol. 62] The Court: I am not passing on the effect. I will receive it. Objection overruled.

Mr. Lichtig: Exception.

The Court: Marked Exhibit C.

(Marked Defendant's Exhibit C.)

The Court: Exhibit B was verified by this witness?

Mr. Spencer: Yes.

The Court: That is why I receive it, for whatever it is worth.

Mr. Spencer: I would like to offer in evidence also the individual income tax return of Mr. Dalton and Florence W. Dalton, plaintiffs in this action, for the calendar year 1924.

The Court: Received.

(Marked Defendant's Exhibit D.)

Q. Mr. Dalton, I understand from your direct testimony that on one or two occasions, the Dalton Manufacturing Company borrowed certain sums of money from banks, is that correct?

A. Yes.

Q. How many times were such loans made by the banks to the Dalton Manufacturing Company?

A. I can not tell you; several times.

The Court: Quite a number?

The Witness: Yes.

Q. Have you any idea as to what years those loans were made?

A. I could not tell that. I think Mr. Becker, the accountant, can give you that exact information.

[fol. 63] Mr. Spencer: I think that is all, your Honor.

Redirect examination.

By Mr. Lichtig:

Q. Mr. Dalton, you were asked under cross examination about merchandise having been bought by the Dalton Manufacturing Corporation for resale, and you testified that included tools, dogs, chocks and collets?

A. Yes.

Q. Did it also include the raw material such as iron which you use in the manufacture of lathes?

A. Yes.

The Court: Also included the materials.

Mr. Lichtig: Raw materials, such as iron and steel.

Q. The business of the Dalton Machine Company and the Dalton Manufacturing Corporation and the Dalton Tool

Corporation, concerning which you were interrogated and concerning which you were asked whether they were not continuing businesses. Isn't it a fact that the business of each was somewhat different from the other?

A. That is true.

Q. To promote different patents of yours?

A. Yes.

Q. You testified that you received no income from inventing or engineering or promoting since 1914. Was that because you did not have hopes of profit from those enterprises?

A. I had hopes of making a big thing out of it.

Q. You went into it with that hope in mind?

A. Yes.

[fol. 64] Q. Shippan Point, Connecticut, is in Stamford?

A. Yes.

Q. You testified you spent your time in Stamford without mentioning Shippan Point as a part of Stamford.

The Court: Sound Beach is in Stamford, or where?

Mr. Lichtig: That is separate——

The Witness: It is in the Township of Greenwich.

Q. Mr. Spencer asked whether in your opinion the Dalton Manufacturing Corporation would have been insolvent if you had insisted on your money being paid to you, and I think you answered that you thought it would have been. Did you, in making that answer, consider the value of the real estate which the corporation owned, and also the value of the patents which you assigned to the corporation as assets of the corporation?

A. No.

Q. In other words, you meant if the corporation had to pay out this cash or accounts receivable, it would not have had enough money to pay your claims in full?

A. That is true.

Q. In other words, in your opinion the current assets were not sufficient to pay current liabilities?

A. That is true.

Q. You did not take into consideration the fixed assets?

A. No.

Q. At the end of 1924 you were asked whether the Dalton Manufacturing Corporation had any assets whatsoever. I

did not hear the answer you made. Will you repeat the answer which you made at that time?

A. End of 1924?

[fol. 65] Q. Yes. I will withdraw that for the time being. In December, 1924, the Dalton Manufacturing Corporation owned patents which you assigned to the Dalton Manufacturing Corporation?

A. Yes.

Q. Had those patents been disposed of by the end of 1924?

A. No, they were assigned, I think, in 1925.

Q. You testified that Frank Miller and Sadie Cohan were directors and officers of the corporation. They were employes, too, were they not?

A. Yes.

Q. You merely used them as nominal officers and directors?

A. Yes.

Q. They owned no stock of the company?

A. No.

Q. Did you sell personally any of the product of the Dalton Manufacturing Corporation to the United States Government?

A. Yes.

Q. When was that?

A. We sold so much to the staff of the United States Government over a period of years—I do not remember.

Q. During what particular period was it, after 1917?

A. We entered the war in——

Q. 1917.

A. When we entered the war, the War Department telegraphed me to come to Washington. I went down. I entered into negotiations at the time for the sale of a number of machines and afterwards secured an order from the War Department. I made several trips to Washington.

Q. That was in 1917 or 1918?

A. 1917 and 1918.

Q. How about 1919?

A. Still sold in 1919.

Q. And you personally took care of those sales, Mr. [fol. 66] Dalton?

A. Yes. And after the war closed, we received orders.

Q. 1920?

A. Yes.

Q. They are still using the lathes on some of their submarines now?

A. Yes.

Q. Did you sell these lathes to the Government personally?

A. Yes.

Q. So when you testified in answer to Mr. Spencer that the last time you sold lathes or other products for the Dalton Manufacturing Company was in 1917, you did not consider the various trips you made to Washington, to the War Department, to sell lathes?

A. The last time I sold machinery in 1917—I want to correct that. I sold up to the time of the termination of the company.

Q. I understand that to be the fact. I understood the answer differently. You continued to sell the product of the Dalton Manufacturing Company up to the time the Dalton Manufacturing Company ceased doing business, is that correct?

A. That is true.

Q. You did make various efforts to sell your stock?

A. Yes.

Q. When you interviewed these various prospective purchasers for the stock of the Dalton Manufacturing Corporation, you were asked whether you told them the corporation had made profits, you told Mr. Spencer you did not misrepresent the facts. Did you tell those prospective purchasers that the Dalton Manufacturing Corporation owned the patents for useful lathes?

A. I did.

Q. And was that one of the important considerations which moved you to enter into negotiations for the sale and [fol. 67] purchase of your stock?

A. It was.

Q. You have testified as to the various patents which were assigned by you to the Dalton Manufacturing Corporation and in so doing you refreshed your recollection from this letter dated June 6, 1921, written by the Dalton Manufacturing Corporation to Leon Brummer (handing witness)?

A. Yes.

Mr. Lichtig: Mark this for identification, please.
The Court: Exhibit 3 for identification.

(Marked Plaintiff's Exhibit 3 for identification.)

Q. In 1923 you employed the Standard Appraisal Company of New York to make an appraisal of the assets of the Dalton Manufacturing Corporation?
A. We did employ them. I do not know the date.
Q. The time you did employ them, they gave you valuations for the assets of your company, is that correct?
A. Yes.
Q. And those valuations were cash valuations as a concern winding up its business or as concern continuing its business, which was it?
A. I do not recall that, Mr. Lichtig. I know I employed them at one time to appraise the property.

Mr. Lichtig: May I offer in evidence, if your Honor please, the 1925 income tax return filed by the plaintiffs in this action?
The Court: That is the individual return?
[fol. 68] Mr. Lichtig: Yes.
The Court: Any objection?
Mr. Spencer: No objection.
The Court: Received. Exhibit 4.

(Marked Plaintiff's Exhibit 4.)

The Court: That is the joint husband and wife return?
Mr. Lichtig: Yes.

Q. Mr. Dalton, with respect to this $395,000 you were asked whether that was all paid in in cash. Isn't it a fact that part of that was merchandise but a substantial part was cash?
A. We had to pay cash to buy merchandise.
Q. That is what I mean?
A. Yes.

Mr. Lichtig: That is all. That is plaintiff's case.
Mr. Spencer: I would like to ask Mr. Dalton one or two further questions.

Recross-examination.

By Mr. Spencer:

Q. Mr. Dalton, when was the real estate of the Dalton Manufacturing Company sold? Was it in 1924 or 1925?

A. I will have to get that information from Mr. Becker; I really do not know.

Q. You have answered a question on re-direct which refutes the testimony you gave on cross examination, namely, that the obligations of the corporation were not in excess of the assets of the corporation. You say now on re-direct examination that you had not considered the value of the real estate, for instance. I would like to know what value was placed on the real estate and at what price it was sold.

A. I can tell you the price it was sold for, but not the exact [fol. 69] date. I do not remember.

Q. You can say before that date. That is sufficient.

A. It was sold before 1926, the early part of 1925.

Q. You are willing to make that statement, although in your verified return to the Commissioner——

A. I can not give that. Mr. Becker is here and he has got the record. I am not very good on dates.

Q. Are you inclined to think that in each of the years 1919 to 1924, the obligations of the Dalton Manufacturing Company exceeded the assets?

A. No, they did not.

Q. Your testimony is somewhat changed from what it was a few minutes ago. I want to know why you changed it. There must be something entering into the picture that I did not cover on cross examination. I am wondering what is was.

The Court: He said on his re-direct examination that in answering your question he had only in mind the current assets and liabilities, not the fixed assets and liabilities.

Q. Of course, the result of the activities of the Dalton Manufacturing Company resulted in your never having received a cent from any of the loans you made to the Dalton Manufacturing Company?

A. Yes.

Q. And the Dalton Manufacturing Company was at no time in position to return to you the amount of your loan?

A. That is true.

Q. Even though the entire assets of the corporation had [fol. 70] been sold?

A. No, I would not say that, not over the entire period of existence of the company.

Q. At the end of 1924 or by the end of 1924, you had loaned to the Dalton Manufacturing Company upwards of half a million dollars, had you not?

A. Close to that, yes.

Q. And the property which the Dalton Manufacturing Company sold in 1924 would have been insufficient to take care even of a small portion of the loans you had made to the Dalton Manufacturing Company?

A. That is true.

Q. But you say that you were not aware of the price that the real estate was sold for?

A. I said I did know the price.

Q. Will you state it for the purpose of the record?

A. $150,000.

The Court: How much?

The Witness: $150,000 less the real estate commission, $7500.

Q. When you talked of the fixed assets of the Dalton Manufacturing Company, to what did you refer?

A. Machinery and equipment.

Q. For what price were those fixed assets sold by the Dalton Manufacturing Company?

A. We had an auction sale and sold them for—I do not remember what we received for it.

Q. You do not know even approximately?

A. No.

Q. Was the property sold—can you tell us in what year the fixed assets of machinery were sold?

A. Yes.

Q. What year?

A. Sold it in 1925.

[fol. 71] Q. You are sure of that?

A. I would not be positive, but that is my impression.

Q. I want you to bear in mind that in your income tax return you said you had no assets whatever at the close of 1925.

Mr. Lichtig: It was in 1924, the end of 1924, the forced auction sale.

Mr. Spencer: I am trying to get all the facts from the witness.

Mr. Lichtig: That is the fact.

The Witness: Mr. Lichtig handled them.

Mr. Lichtig: Have you anything by which you can verify your recollection on that.

The Witness: I think they have got some records here.

Mr. Lichtig: It was at the end of 1924. We have nothing to show it.

The Court: The sale of the machinery and equipment was at the end of 1924?

The Witness: Yes.

Mr. Spencer: During 1924.

The Court: When was the real estate sold?

Mr. Lichtig: A year or two later. What Mr. Dalton has in mind is an additional sale from the sale by the Dalton Manufacturing Corporation. They sold this real estate in 1924 and then there was a resale in 1926, or in 1925, for $150,000.

By Mr. Spencer:

Q. Mr. Dalton, with your recollection refreshed, you are unable to testify as to when the Dalton Manufacturing [fol. 72] Company sold this real estate?

A. When was that sold? Mr. Lichtig can tell you the exact date.

Mr. Lichtig: That was about in 1926.

Mr. Spencer: You ought to have something to refresh the recollection of the witness.

Q. Could you tell us, Mr. Dalton, when the patents belonging to the Dalton Manufacturing Company were disposed of? I am referring to the patents which they received from you?

A. 1922.

Mr. Lichtig: They never were disposed of. They were never sold, were they?

The Witness: These patents that I owned?

Mr. Lichtig: No.

The Court: That is not the question. You were asked the question when were the patents owned by the Dalton Manufacturing Company sold by it, those being the patents

which you had sold in 1917, to the corporation. The inquiry was directed only to the date when the Dalton Manufacturing Company sold these patents. Do you recall that date?

The Witness: I do not recall.

Q. Could you state whether at the end of 1924 the Dalton Manufacturing Company had any such patents undisposed of?

A. I believe they did.

The Court: Still had some undisposed of?

The Witness: Yes.

[fol. 73] Q. It would appear from an examination of the Dalton Manufacturing Company income tax return for the year 1924, that these patents were considered valueless on that date if they were in existence; there were no assets set up in the hands of the Dalton Manufacturing Company at the end of the calendar year 1924.

A. That might be true. I sold them some patents that cost me a lot of money; there is no value on them today.

Q. Mr. Dalton, I am not trying to get any information about the patents which have always remained in your possession, but only such patents as were transferred at one time or another, and were transferred to the Dalton Manufacturing Company. I am trying to find out when the title changed and at what figure. Mr. Dalton, I want to state to you the purpose of my asking these questions, and it is this: it would seem to me that it is pretty clear that the Dalton Manufacturing Company was insolvent long before the calendar year 1924. Now, I am just endeavoring to ascertain what the assets of the Dalton Manufacturing Company were, say, during 1922 and 1923. The only way I can get at that is to ask you when they disposed of the assets. If you have no definite recollection, perhaps I can get that from another source. I do not wish to annoy you.

A. I have no distinct recollection.

The Court: That is, as to the dates?

The Witness: Yes.

Q. Or even as to the amount disposed of and the value placed on the assets?

A. No.

Mr. Spencer: That is all.

[fol. 74] Redirect examination.

By Mr. Lichtig:

Q. Mr. Dalton, do you recall that in 1924 you closed down the plant of the Dalton Manufacturing Company and after the plant was closed down you had a public auction sale up there of the machinery on hand?

A. Yes.

Q. Do you recall that that was consummated toward the end of 1924?

A. Yes.

Q. That machinery was sold at public auction at a forced sale?

A. Yes.

Q. Were there many bidders present at the sale?

A. Yes, quite a few.

Q. You referred to the sale of the plant formerly used by the Dalton Manufacturing Corporation?

A. Yes.

Q. For $150,000 to the Magazine Repeating Razor Company?

A. Yes.

Q. Do you know when that sale was made?

A. Some time after we had the auction sale.

Q. About how long after?

A. I could not recall that.

Q. But in 1924, the Dalton Manufacturing Corporation had divested itself of the ownership of that plant?

A. Yes.

The Court: In 1924?

Mr. Lichtig: Yes.

Q. So that when the plant was sold to the Magazine Repeating Razor Company at the end of 1925 or 1926, it was sold merely as land and buildings?

A. Yes.

Q. A closed factory?

A. Yes.

Q. Nothing inside?

A. Yes.

[fol. 75] Q. And the factory had been permitted to run down for some months before the sale was consummated with the Magazine Repeating Razor Company?

A. Yes.

The Court: Who made that sale to the Magazine Repeating Razor Company?

Mr. Lichtig: Mr. Dalton.

The Court: And not the Dalton Corporation?

Mr. Lichtig: Yes.

The Court: In other words, Mr. Dalton individually was the predecessor during 1924 of the Dalton Manufacturing Corporation?

Mr. Lichtig: Yes.

The Court: And then at a later date, say 1926, or whatever it was, then Mr. Dalton individually sold it to the Magazine Repeating Razor Company?

Mr. Lichtig: Yes. That is why I say what happened in 1926 is immaterial. It was sold as a closed plant, in run-down condition, and for considerably less than it cost.

The Witness: About $295,000.

Q. And the Dalton Manufacturing Corporation owned certain patents which were received by assignment from you, is that correct?

A. Yes.

Q. Did the Dalton Manufacturing Corporation own those patents at the end of 1924?

A. I do not know.

Q. Could you have placed a value on those patents at the time?

A. No.

Q. I mean a salable value?

A. No.

[fol. 76] Recross-examination.

By Mr. Spencer:

Q. Are you quite sure, Mr. Dalton, that you purchased the plant from the Dalton Manufacturing Company in 1924?

A. My attorney did all the work on the transaction for me. He is more familiar with the dates than I am.

Q. I am just trying to get it from the mouth of some witness who will testify to the exact facts. If you do not remember, I will endeavor to get the information otherwise. That is all.

Mr. Lichtig: That is all. That is plaintiff's case.

Mr. Spencer: I understand the accountant who went over the books of the Dalton Manufacturing Company is here. If he is here, I would like to ask him one or two questions.

Sanford Becker, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Spencer:

Q. Mr. Becker, have you at any time been in the employ of the Dalton Manufacturing Company?

A. Yes.

Q. What period were you in their employ?

A. From 1917 through 1925 and 1926, or 1927, I do not remember. Through 1925, that is when it was dissolved.

[fol. 77] Q. Did you at different times make an examination of the books of the Dalton Manufacturing Company?

A. I did.

Q. As a result of your examination of the books of the Dalton Manufacturing Company, can you state to us in what year or years the Dalton Manufacturing Company disposed of its assets prior to its final dissolution?

A. In 1924.

Q. Was it in 1924?

A. I haven't the exact dates. The books I have here, the yearly closings, as made at the end of each year.

Q. Are you able to state at what price or approximately the price the patents were sold which had been obtained by the Dalton Manufacturing Company from Mr. Dalton?

A. Yes.

Q. What was the approximate price?

A. The patents were not sold.

Q. They were not sold?

A. They were not sold.

Q. In other words, they remained the property of the Dalton Manufacturing Company at the end of 1924?

A. They were carried as of no value.

Q. Did you in any way aid in the preparation of the income tax return?

A. Yes.

Q. And you realized you did not enter any assets of value or any value?

A. Yes.

Q. Isn't it a fact that that is an inconsistent position to take?

A. The figures in the income tax return called for dollars and cents values.

Q. Although the return showed no items of any assets at all?

A. There were no assets of value.

Q. I am talking of the assets regardless—it was something Mr. Dalton testified he hoped to make considerable profit from?

A. Yes.

Q. The real estate of the Dalton Manufacturing Company, [fol. 78] when was that sold, do you remember?

A. Late in 1914.

Q. To whom?

A. Mr. Dalton.

Q. At a public auction?

A. Yes.

Q. What were the fixed assets of the Dalton Manufacturing Company in 1924?

A. They had a plant, machinery, buildings, inventory. That is all.

Q. At what price were they sold, approximately?

A. I cannot give you the exact price.

The Court: Were they sold as a single item?

The Witness: No, the items were sold separately.

Q. Can you give the approximate amount?

A. Of all the assets?

Q. That were disposed of by the Dalton Manufacturing Company?

A. Approximately $250,000.

Q. When were they sold?

A. Late in 1924.

Q. And at a value of $250,000?

A. Approximately.

Q. They were sold at public sale?

A. Yes.

Q. Can you tell us what the liabilities of the corporation were at the time of the sale?

A. The liabilities outside of the amount owed to Mr. Dalton?

Q. I mean inclusive of that?

A. Inclusive of that, $572,000.

Q. As of what date?

A. As of the end of 1924.

Q. Can you state what the——

The Court: And was this after you had credited him with the receipt from the public sale of the fixed assets?

The Witness: No.

[fol. 79] Q. As I understaid it, the assets were disposed of late in 1924. Just prior to the sale there were outstanding obligations?

A. Yes.

Q. Can you state what the obligations of the Dalton Manufacturing Company were at the end of 1923, approximately?

A. I can give you the total. I can compile it.

Q. I would like for you to give us the approximate total for the record.

A. At the end of 1923, the liabilities were $495,000 in round figures—$545,000.

Q. What were the assets at that same time?

A. The assets at realizable values were $369,000.

Q. Can you state what the liabilities of the Dalton Manufacturing Company were at the end of 1922?

A. There is one thing to be said about this: these assets are stated as of 1923 at realizable values and not at book values. Those are the values that were written down.

Q. How do you know that?

A. It is very clearly stated there on the return.

Q. That differs with your books?

A. No, it does not.

Q. Then it is a book value?

A. The book values were reduced to actual realizable values.

Q. Can you testify from the books as to what the amount of the liabilities were at the end of 1923?

A. Yes. It will take some few minutes to compile that. $543,000.

Q. As of what date?

A. December 31, 1923.

Q. What were the assets as of that date?

A. I think if you will let me have the income tax return it will help me, if you please.

(Document handed to witness.)

A. (Continuing.) Before writing the assets down to realizable values, they were $559,000.

[fol. 80] Q. What do the books show?

A. $559,000 with a write down, a realizable value of $194,000.

Q. That does not mean the market value, does it?

A. Yes.

The Court: That leaves $365,000?

The Witness: Yes, sir.

Q. Were not the patents written off in 1923?

A. Yes, sir, at the same time.

Q. Now, when you stated the liabilities of the corporation in 1923, are you considering the obligations of the Dalton Manufacturing Company to Mr. Dalton?

A. Yes.

Q. What were the outstanding obligations of the corporation to Mr. Dalton at the end of 1923?

A. $483,000.

Q. What is that figure?

A. $483,000, the amount due Mr. Dalton from the Dalton Manufacturing Corporation as of December 31, 1923.

Q. As I understand it, Mr. Becker, the item of $483,000 does not include the amount of the mortgage outstanding or the capital stock?

A. No, sir, it does not.

The Court: What is that amount?

The Witness: $483,000 does not include the mortgage of $50,000 or the capital stock.

Q. Or the notes payable?

A. Or the notes payable.

Mr. Spencer: That is all.

[fol. 81] Cross-examination.

By Mr. Lichtig:

Q. Mr. Becker, you are and were in 1921 and 1922 and since then, a certified public accountant?

A. Yes.

Q. And you are a member of the firm of Brummer & Becker?

A. Yes.

Q. And as such certified public accountants, you audited the books of the Dalton Manufacturing Corporation?

A. Yes.

Q. That was done under your personal supervision?

A. Yes.

Q. You prepared the income tax return for the Dalton Manufacturing Corporation?

A. Yes.

Q. For the years 1923, 1924 and 1925?

A. Yes.

Q. And prior years?

A. Yes.

Q. You also prepared Mr. and Mrs. Dalton's income tax returns for the same period?

A. Yes.

Q. Now, you testified here about a writeoff or writedown of the assets in 1923, and you stated that the written down price represents the market value. Does that represent the market value as a going concern, or does it represent the market value at forced sale in liquidation?

A. As a going concern.

Q. If the property was sold at forced sale, would it bring more or less, in your opinion?

A. Less.

Q. At the time of this auction sale in 1924, the plant had been closed down, had it not?

A. Yes.

Q. And that was sold as a closed business?

A. Yes.

Q. A liquidated business?

A. Yes.

Q. In 1923, the concern was a going concern, was it not?

A. Yes.

[fol. 82] Q. Now, you were asked about the value of these patents which the company owned. Of course, you are not testifying as an expert to the value of patents?

A. No, sir.

Q. You realized, too, that Mr. Dalton had spent upwards of seven hundred thousand dollars trying to exploit these patented articles?

A. Yes.

Q. Without any measure of success, as far as the patents owned by the Dalton Manufacturing Company?

A. Yes. I merely stated that the value on the books was carried as nil. I did not state my opinion of the value of the patents.

Q. You wrote down these assets in 1923?

A. Yes.

Q. On what did you base the values to which you wrote down the assets?

A. There was an appraisal.

Q. Was that appraisal at the replacement value or an appraisal at sound value?

Mr. Spencer: May I say here, I do not understand that the witness is testifying as an expert.

The Court: No, he is just giving information as to where he derived the values, whether at cost or whether it was an appraisal. Now he says it was on an appraisal. Now he has been asked whether it was on one basis or another.

The Witness: That I do not remember. I would have to look it up.

Q. It would make a difference whether you cut down the figures to replacement value or whether you cut down the figures to sound value?

A. Yes.

[fol. 83] Q. There would be a marked difference between the two?

A. Yes.

Q. You do not know which you gave in this instance, do you?

A. I do not remember which it was.

Q. In your opinion, Mr. Becker, based on your knowledge of the book affairs of the Dalton Manufacturing Corporation, would you say the corporation was or was not solvent in 1924?

Mr. Spencer: I do not know whether he has any basis to give his opinion on that and I think it should be excluded.

The Court: No, I think not.

Mr. Lichtig: Exception.

The Court: He does not know anything about values.

Mr. Lichtig: No, he does not.

The Court: All he knows is about the books.

Q. According to the books of the Dalton Manufacturing Corporation, before this writedown, would you say the corporation was or was not solvent in 1923?

A. It was solvent.

Q. It was solvent?

A. Yes, its assets exceeded the liabilities.

Q. And in 1924 would you say from the books that the Dalton Manufacturing Corporation was or was not solvent toward the latter part?

A. It was not.

Q. It closed down its plant in 1924 around September?

A. Yes.

Q. And stopped conducting its business further during the Summer of that year?

[fol. 84] A. I do not remember the exact time. It was during the Summer.

Q. You stated an item of $483,000 of liabilities did not include the mortgage of $50,000.

A. As of what date?

Q. 1923?

A. Includes $60,000 of outside liabilities and $483,000 to Mr. Dalton.

Redirect examination.

By Mr. Spencer:

Q. That did not include the $50,000 mortgage and bond which had been guaranteed by Mr. Dalton, nor did it include the capital stock, nor did it include the number of notes payable on which Mr. Dalton was the endorser, is that right?

A. Yes.

Recross-examination.

By Mr. Lichtig:

Q. When you used the words, "realizable value," did you mean replacement value or sound value?

A. Appraised value.

Q. You do not know whether it was made on a sound value basis or replacement value basis, do you?

A. I do not know.

Q. I show you this statement, marked Plaintiff's Exhibit 2, and ask you whether the original of that was prepared by you (handing witness)?

A. Yes.

Q. From the books of the Dalton Manufacturing Corporation?

A. Yes.

Q. Does this show the condition of the company as it existed on December 1, 1922?

A. Yes.

Q. Does it show that Mr. Dalton waived the obligation which was owing to him for the purpose of obtaining the loan?

A. Yes.

[fol. 85] Q. And the advances he had made up to that time were how much?

A. $436,000.

Mr. Lichtig: That is all.

Redirect examination.

By Mr. Spencer:

Q. Mr. Becker, the apraisal which you spoke of a few minutes ago was not made by you, was it?

A. No.

Mr. Spencer: That is all. The Government rests.

Mr. Lichtig: And the plaintiff rests.

Mr. Spencer: I move for the direction of a verdict in favor of the defendant, dismissing the complaint on the merits.

Mr. Lichtig: I make a motion for the direction of a verdict in favor of the plaintiff for the amount claimed in the complaint.

The Court: Decision reserved. I understand that you gentlemen will check over these figures.

Mr. Spencer: Yes.

The Court: Do you want to argue this?

Mr. Spencer: Whatever is most agreeable to everyone concerned. I think that is the best way. If I could see a transcript I could do that better.

The Court: I will hear argument in the morning.

(Adjourned to March 20, 1931, at 10:30 a. m.)

[fol. 86] OPINION

CAFFEY, J.:

The Court: This is an interesting case and is an illustration of what so frequently happens, that there is no case just precisely like it.

There are two questions here. As I see it, the first arises under the first cause of action and is a mere matter of dates; that is, what is the date when the loss was ascertained? If it was 1925, then the plaintiff is entitled to recover on the first cause of action. If it was not a loss ascertained or sustained in 1925, then was it a loss ascertained or sustained in 1924? If it was in 1924, then you come to the second question and that is, whether or not it was sustained in a trade or business regularly carried on by the taxpayer during 1924; because if it was sustained in 1924 and sustained in a trade or business regularly carried on by the taxpayer during that year, then, as I understand, that would carry the net loss over to 1925.

You therefore come down to two questions: (1) When was the loss sustained? (2) If in 1924, was it in a trade or business regularly carried on?

It seems to me under the proof that we can not escape the conclusion that the loss was either in 1924 or in 1925. The Commissioner says it was in 1924. Perhaps that is not conclusive as to the year the loss occurred, and I inquire, was it as early as 1923? I think not, in the sense of the law. Manifestly the statute and the regulations do not confer [fol. 87] upon the taxpayer an arbitrary power to select the date. It must be based upon actual facts; but nevertheless the courts have frequently said there is some range for business determination, otherwise you would straightjacket business. The statute does not mean to do that.

What happened in 1923? The Sound Beach plant was still in full operation, but it was under a reduced headway;

there were seventy-five or eighty employees engaged there and the merchandise bought was approximately $11,000, and the sales, as I gather them from the papers, were possibly six or seven thousand dollars and the cost of manufacturing was approximately $60,000.

I do not think that it is determinative of the question as to whether or not at the time the corporation was solvent. We must take into account what the courts know, that there are periods of financial stress, bad business, at which times the only way operators of a business may, in the exercise of hope or in the exercise of judgment, go on is with the contemplation of pulling through and that eventually the investment involved will pull out and profit may be earned, or they may reach the conclusion that it is best to liquidate the business and abandon it.

It seems to me that, on the facts as to the condition of the Dalton Manufacturing Corporation in 1923,—what actually did happen, what the proof shows was in contemplation,—we can not say that in 1923 the business was not regularly continued and carried on by the taxpayer. It cannot be said that in 1923, in the same sense in which the expression is used in the tax law, it was ascertained that the stock in [fol. 88] this enterprise was worthless. Many a corporation and many a business goes through periods of ups and downs. You can take book figures from time to time or appraisals, or what not, and you can establish as of certain dates that a business was insolvent; but we know also, as matter of common experience, that a business in that condition may continue and frequently pulls out and becomes large and profitable. It cannot be said, under circumstances like that, that the establishment of those figures as of a certain date shows that the business was then determined to be insolvent or, even though we now turn hindsights on that business, that those in charge of it ought to have abandoned it. The law permits a range within which to determine that. The tax laws were not designed so to straightjacket business. If there were such peril, and the taxpayer, in order to get the advantages provided by the tax law and the regulations as to deductions, must at his risk have made the determination only with this later date in mind, it would mean that he ought to have made it in the light of later developments. That interpretation would lead to absurdity.

With this business going on as it was in 1923, I am bound to conclude that there was no ascertainment as early as 1923 that the stock was worthless.

Let us assume what the Commissioner has held, namely, that the stock became worthless in 1924. It seems to me that, if we accept that conclusion, it follows from the proof that the taxpayer in 1924 was engaged in a trade or business regularly carried on, which included the operation of the Dalton Manufacturing Corporation. I understand the [fol. 89] decisive test is whether or not the taxpayer carried on the business with which we are concerned as a vocation. I do not think, from the decisions, that it is necessary, in order to have the benefit of carrying a net loss over one year or longer, that the part-cular business involved in the controversy shall have been the whole of the vocation of the taxpayer. If it was a part of his regularly carried on vocation, and there was a net loss incurred in that, then he is entitled to carry that over to the succeeding year.

I cannot help but feel, from listening to the testimony, that the Dalton Manufacturing Corporation was in a sense his alter ego to the extent that it was employed by the individual taxpayer, and, therefore, if we first conclude that the loss occurred in 1924, then we are bound to reach the further conclusion that, in the sense of the law, that loss was incurred in a trade or business regularly carried on by the taxpayer in 1924.

This is an unusual case. It is unusual to have a vocation carried on in precisely this way; but when I listen to the account given by the taxpayer of what his experience has been over a number of years and of what he actually did with respect to this particular corporation, I cannot escape the conclusion that we are to regard it, within the true intent and meaning of the tax law, as a trade or business regularly carried on in 1924.

I am inclined to concur in the conclusion of the Commissioner that the ascertainment of the loss was in 1924. It seems to me that the law is very persuasive, and the law as laid down by the court of appeals in this circuit seems to me to sustain the conclusion, that the loss was sustained in [fol. 90] 1924. However, I do not find it necessary to determine whether it was ascertained that there was a loss in 1924 or in 1925, because the result is the same.

Certainly some argument can be made, and some plausible argument, that there was, within the sense of the regulations and law, an ascertainment that the loss did not occur until 1925. In other words, I think there is some force in the argument of counsel for the plaintiff that, upon the facts of the case involved, it may be disputable as to when the loss was incurred.

The cost of the stock was $395,000. The loss was therefore that sum. In round figures, the 1924 income was $21,000. If there be a right to carry over the net loss from 1924, it would be approximately $374,000. The entire 1925 net income was $292,000; so that the net loss is sufficient completely to absorb the 1925 income. On the other hand, if the stock loss was ascertained in 1925, it follows that there was no additional tax for the year 1925. There was a single payment of $56,841.32. That payment was made by the taxpayer on September 10, 1928.

It seems to me that the taxpayer, on the undisputed facts, is entitled to recover the additional tax that was exacted from him, with interest from the date on which it was paid.

I therefore direct a verdict for plaintiff in the sum of $56,841.32, with interest from September 10, 1928.

The motion of the defendant for a direction of verdict in his favor is denied, and defendant may have an exception.

[fol. 91] BILL OF EXCEPTIONS

The following exceptions were requested by Mr. Spencer on behalf of the defendant and allowed by the Court within a few moments after the attorneys for the plaintiff had left the court room and during their absence:

Defendant excepts to the direction of the verdict in favor of the plaintiff.

Defendant excepts to the refusal of the Court to direct a verdict in his favor.

Defendant moves to set aside the verdict on the ground that it is against the weight of evidence, the law, and the other grounds set forth in the New York Civil Practice Act.

The Court: Denied.

Mr. Spencer: Exception.

[fol. 92] PLAINTIFF'S EXHIBIT 1

Hubert Dalton

Patent Applications and Patents Issued

Title	Date patent application filed	Serial #	Date patent granted	Patent #
Lathe Headstocks	June 5, 1925	35,043	Mar. 27, 1928	1,663,828
Curtin Holders	Oct. 21, 1926	143,035	Apr. 17, 1928	1,666,408
Curtin Holders	Oct. 21, 1926	143,036	Apr. 17, 1928	1,666,409
Curtin Holders	Oct. 21, 1926	143,037	Apr. 17, 1928	1,666,410
Saw Table Attachment for Lathes	Sept. 22, 1925	57,818	Feb. 19, 1929	1,702,499
Motor Casing	Oct. 1929	12,711	.....	.....
Curtin Holders	July 9, 1928	291,423	Dec. 31, 1929	1,741,504
Curtin Holders	July 9, 1928	291,424	Dec. 31, 1929	1,741,505
Drive Means for Lathes and Similar Machines	June 13, 1924	719,756	Feb. 18, 1930	1,747,621
Smokers Stands	Apr. 23, 1930	446,498	.....	.....
Belt Tightening Mechanism for Motor Driven Supply Units	Jan. 9, 1925	1,335	Nov. 18, 1930	1,782,195
Threadless Nuts or Collars	Feb. 10, 1928	253,352	Nov. 18, 1930	1,782,196
Design for Top Smokers Stand	Aug. 12, 1930	36,639	Nov. 25, 1930	82,603
Design for Smokers Stand	Aug. 12, 1930	36,638	Dec. 16, 1930	82,800
Signal Lamp & Fag Stand	Feb. 27, 1931	.....	.....	.....

[fol. 93]

Ornamental Design	Apr. 1, 1914	828,915	June 2, 1914	45,857
Ornamental Design	Apr. 1, 1914	828,916	June 2, 1914	45,858
Headless Nut or Collar	Apr. 7, 1914	817,148	Oct. 20, 1914	1,114,123
Shaft Hangar	Mar. 28, 1914	827,849	Oct. 20, 1914	1,114,124
Grinder Counter Shaft	Oct. 7, 1916	124,235	Jan. 23, 1917	1,213,594
Countershafts	Oct. 7, 1916	124,234	June 19, 1917	1,230,128
Cabinet Stand	Oct. 23, 1917	198,177	Mar. 26, 1918	51,897
Frame for Combination Lathe Drilling & Milling Machine	Apr. 20, 1921	463,052	.....	.....
Telescopic Shaft	Sept. 13, 1921	500,402	.....	.....
Frame for Combination Lathe, Drilling & Milling Machine	Sept. 16, 1921	505,199	.....	.....
Gear Guard	Nov. 29, 1921	518,517	Mar. 7, 1922	1,408,866
Improvements in Combined Laths Drilling & Milling Machines	June 10, 1921	.....	Nov. 9, 1922	181,311
Steady Rests for Lathes	May 28, 1925	33,350	.....	.....
Motor Driven Power Supply Units	Jan. 16, 1925	529,406	June 30, 1925	1,544,377
Back Rest for Lathes	Sept. 18, 1925	57,064	.....	.....
Casing for Electric Motors	Mar. 13, 1925	15,197	Apr. 27, 1926	1,582,640
Combination Lathe, Drilling & Milling Machine	.....	.....	Mar. 8, 1927	1,620,522

[fol. 94]

United Kingdom

Title	Date patent application filed	Serial #	Date patent granted	Patent #
Improvements in Combined Lathe Drilling & Milling Machines	Oct. 4, 1921	26,244/21	Nov. 9, 1922	181,311
Curtain Holders	Oct. 20, 1927	27,916/27	Feb. 16, 1928	279,480
Curtain Holder	Oct. 20, 1927	27,917/27	Feb. 16, 1928	279,481
Curtain Holder	Oct. 20, 1927	27,918/27	Feb. 16, 1928	279,482
Curtain Holder	July 28, 1928	21,955/28	Sept. 26, 1929	319,450
Curtain Holder	July 28, 1928	21,956/28	Sept. 26, 1929	319,451
Means for Detachably Securing Collars or Sleeves on Shafts	Feb. 8, 1929	4,343/29	Jan. 16, 1930	305,673
Smokers Stand	June 6, 1930	17,598	.....	.....
Design for Smokers Stand	Dec. 2, 1930	.....	.....	.....
Design for Top Smokers Stand	Dec. 2, 1930	.....	.....	.....

Irish Free State

Curtain Holder	Oct. 21, 1926	279,480
Curtain Holder	Oct. 21, 1926	279,481
Curtain Holder	Oct. 21, 1926	279,482

[fol. 95]

Canada			
Combination Lathe, Drilling & Milling Machine	.....	.....	Sept. 10, 1921	258,168
Curtain Holder	Oct. 12, 1927	330,030	Apr. 17, 1928	279,363
Curtain Holder	Oct. 12, 1927	330,331	Apr. 17, 1928	279,364
Curtain Holder	Oct. 12, 1927	330,332	Apr. 17, 1928	279,365
Curtain Holder	July 16, 1928	339,361	Jan. 8, 1929	286,195
Curtain Holder	July 16, 1928	339,360	Jan. 8, 1929	286,196
Threadless Nuts or Collars	Jan. 26, 1929	.....	July 9, 1929	291,087
Smokers Stand	May 12, 1930	364,541	Dec. 16, 1930	306,651
France			
Improvements in Combined Lathe Drilling & Milling Machine	Sept. 26, 1921	.....	July 28, 1922	541,517
Threadless Nuts or Collars	Jan. 31, 1929	.....	July 22, 1929	668,814
Design for Smokers Stand	Mar. 1, 1931	27,187	.....	.....
Design for Top Smokers Stand	Mar. 1, 1931	27,186	.....	.....
Smokers Stand	May 30, 1930	296,241	Feb. 1931	697,032
Italy			
Combination Lathe, Drilling & Milling Machine	.....	.....	Mar. 18, 1924	202,965

[fol. 96]

Germany

Title	Date patent application filed	Serial #	Date patent granted	Patent #
Combination Lathe, Drilling & Milling Machine	.....	.....	Sept. 29, 1921	D40481 1/49 A1
Threadless Nuts or Collar	.....	.....	Feb. 7, 1929	487,277
Curtain Holder	.....	.....	May 23, 1929	1,123,322
Curtain Holder	.....	.....	May 23, 1929	1,123,323
Smokers Stand	May 30, 1930	.....	.....	.....
Design for Smokers Stand	Nov. 25, 1930	.....	.....	.....
Design for Top Smokers Stand	Nov. 25, 1930	.....	.....	.....

Hubert Dalton

Trade-marks

Dalton	Mar. 2, 1921	144,223	Oct. 11, 1921	147,205
Dalton Six	.....	.....	Oct. 23, 1917	119,051
Dalton T. L.	Oct. 4, 1921	147,205	.....	.....
	Nov. 10, 1921	155,258	July 25, 1922	157,040
Hydroash	Apr. 24, 1930	299,377	Aug. 26, 1930	274,447

Germany

Dalton	.....	.....	May 12, 1922	286,045/23

			Italy		
Dalton	.....	.....	.....	May 28, 1921	400
Dalton T. L.	.....	.....	.....	Mar. 26, 1925	21,681
			City of Danzig		
Dalton	.....	.....	.....	Aug. 23, 1922	1,787
			United Kingdom		
Dalton	.....	July 8, 1921	416,792	.....	.....
			Belgium		
Dalton	.....	.....	.....	June 21, 1921	24,975

[fol. 97] PLAINTIFF'S EXHIBIT 2

Dalton Manufacturing Corporation

Financial Statement

December 1st, 1922

Assets:		
Cash in Bank		$1,830.78
Accounts Receivable		21,197.83
Notes Receivable		6,927.00
Merchandise and Material Inventory		89,000.00
Machinery and Tools		186,168.79
Real Estate and Plant		275,925.08
Patents		21,500.53
Sundries		266.11
Goodwill		28,714.34
Total assets		$631,530.46
Liabilities:		
Accounts Payable	$4,605.63	
Notes Payable	66,500.00	
		71,105.63
Net worth—Subject to note below		$560,424.83

NOTE.—There is omitted from the above financial statement, the liability to Hubert Dalton amounting to $436,179.30.

[fol. 98] PLAINTIFF'S EXHIBIT 3 FOR IDENT.

Dalton Manufacturing Corporation

(Letter Head)

Main Office and Factory: Sound Beach, Conn., U. S. A.

Ex. #3 Ident., U. S. Dist. Court, S. D. of N. Y.

June 6, 1921.

Mr. Leon Brummer, 287 Broadway, New York City.

DEAR MR. BRUMMER: Regarding Treasury Dept. letter bearing date of March 11th in reference to various items, the following answers:

Item 5. List of Patents issued to Hubert Dalton assigned to Dalton Mfg. Corpn.

Issued June 2/14, 7 yrs. Design Patent No. 45,857, Serial No. 828,915.

Issued June 2/14, 7 yrs. Design Patent No. 45,858, Serial No. 828,916.

Issued Mar. 26/18, 14 yrs. Design Patent No. 51,897, Serial No. 198,177.

Issued Oct. 20/14, 17 yrs. Design Patent No. 1,114,124, Serial No. 827,849.

Issued Oct. 20/14, 17 yrs. Design Patent No. 1,114,123, Serial No. 817,148.

Issued June 19/17, 17 yrs. Design Patent No. 1,230,128, Serial No. 124,234.

Issued Jan. 23/17, 17 yrs. Design Patent No. 1,213,594, Serial No. 124,235.

Item 6. No insurance on life of officers.

Regarding other items, Miss Cohen will go over these with you.

Yours truly, Dalton Manufacturing Corpn.

[fol. 99] PLAINTIFF'S EXHIBIT 4

Individual Income Tax Return

Office Audit

Form 1040
U. S. Internal Revenue
(Auditor's Stamp)
Sec. 274 Act 1926
Assessment
Tax $50,000.46
Penalty
Interest 7106.91
Total $57,107.37
Basis OA or RAR RAR 12/16/27
Audited by N. F. 12/20 1927
Unit No. FAR-B3
List Jul 28 1928
No. 4
Page 10 Line 8

F. Rodemeyer
Int. Rev. Agt.
M. R. 10/1/26
Do not Write in These Spaces
File Co. 355
Serial Number 753202
(Cashier's Stamp)
2nd New York
Cash Check M. O. Cert. of Ind.
First Payment
$.....
Examined
By.....
F. A.

For Net Incomes of More than $5,000 or Net Incomes, Regardless of Amount, if Derived from a Profession or Business, Including Farming, for Calendar Year 1925

File this return with the Collector of Internal Revenue for your district on or before March 15, 1926.

(Print name and address plainly below:)

Florence W. Dalton and Hubert Dalton, care of Arnold Lichtig, 141 Broadway, New York City.

Occupation, profession, or kind of business: ——.

1. Are you a citizen or resident of the United States? Yes.

[fol. 100] 2. If you filed a return for 1924, to what Collector's office was it sent? Hartford, Conn.

3. Is this a joint return of husband and wife? Yes.

4. State name of husband or wife if a separate return was made and the Collector's office to which it was sent? ——.

5. Were you married and living with husband or wife on the last day of your taxable year? Yes.

6. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you? ——.

7. If your status in respect to questions 5 and 6 changed during the year, state date of such change. ——.

8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? One.

Income

Item and Instruction No.

1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received): Amount received, $—; Expenses paid (Explain in Schedule F), ——.

2. Net Profit from Business or Profession (from Schedule A): ——.

Item and Instruction No.

[fol. 101] 3. Interest on Bank Deposits, Corporation Bonds, etc. (except interest upon which an income tax of 2% was paid at source): $4,234.03.

(a) Interest on Tax-free Covenant Bonds Upon Which an Income Tax of 2% was Paid at Source: ——.

4. Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.): ——

5. Rents and Royalties (from Schedule B): ——.

6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (from Schedule C): Loss, $395,000.00.

7. Dividends on Stock of Domestic Corporations: $251,731.00.

Dividends on Stock of Domestic Corporations from Estate Alice N. Whiting: $43,212.50.

8. Taxable interest on Liberty Bonds, etc. (from Schedule E): ——.

9. Other Income (including dividends received on stock of foreign corporations) (state nature of income):

(a) ——.

(b) ——.

(c) ——.

10. Total Income in Items 1 to 9: None.

Deductions

11. Interest Paid: $3,000.00.

12. Taxes Paid (explain in Schedule F): $3,955.22.

[fol. 102] 13. Losses by Fire, Storm, etc. (explain in Table on page 2): ——

14. Bad Debts (explain in Schedule F). ——.

15. Contributions (explain in Schedule F): $520.00.

16. Other Deductions Authorized by Law (explain below or on separate sheet): ——.

(a) ——.

Item and Instruction No.

(b) ——.

(c) ——.

17. Total Deductions in Items 11 to 16: $7,475.22.

18. Net Income (Item 10 minus Item 17): None.

* * * * * * *

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, etc. (See Instruction 6)

1. Kind of Property: Stk. Dalton Mfg. Corp.

2. Date Acquired: 1917.

3. Amount Received: None.

4. Depreciation previously allowed: $——.

5. Cost: $395,000.00.

6. Value as of March 1, 1913: $——.

7. Subsequent improvements: Loss.

8. Net Profit (Enter as Item 6): $395,000.00.

State how property was acquired. This Company was dissolved in 1925. The sale of all its assets did not yield [fol. 103] enough to pay creditors. The stockholders received nothing.

* * * * * * *

Schedule E—Interest on Liberty Bonds and Other Obligations or Securities. (See Instruction 8)

* * * * * * *

2. Interest Received or Accrued: $1,000.00.

3. Amount Owned: $25,000.00.

4. Principal Amount Exempt from Taxation: All, ——; All, ——; All, ——; $5,000, $50,000: None.

5. Amount Owned in Excess of Exemptions: None.

6. Interest on Amount in Excess of Exemptions (Enter as Item 8): None.

Schedule F—Explanation of Deductions Claimed in Items 1, 12, 14, and 15

Item 12, Taxes

Tax on Real Estate	3,719.62
Auto Licenses	146.60
Club Dues	85.00
Personal Tax	4.00
	3,955.22

* * * * * * *

Item 15, Contribution

St. Paul Episcopal Church, $520.

* * * * * * *

[fol. 104] Affidavit

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1924 and the Regulations issued under authority thereof.

Florence W. Dalton, Hubert Dalton, Stamford, Conn.

Sworn to and subscribed before me this 8th day of March, 1926. E. M. Doyle, Notary Public.

[fol. 105] Defendant's Exhibit A

* * * * * * *

Corporation Income Tax Return for Calendar Year 1924

File this return with the collector of Internal Revenue for your district on or before March 15, 1925.

6—52

Form 1120
U. S. Internal Revenue
(Auditor's Stamp)
AUDITED
Files Audit
No Tax Due
Auditor Gagle
Unit No. 2
Date Jan. 7, 1926.
No apparent income 1924
Verify loss before applying 1925.

Page 1 of Return
File Code 47
Serial Number 851470
First Payment
$.....
Examined
By.....
(Cashier's Stamp)
Cash Check M. O. Cert. of Ind.

(Print plainly corporation's name and business address.)
Dalton Manufacturing Corporation, Sound Beach, Connecticut.
Date of Incorporation: June 30th, 1917.
Under the Laws of What State or County: New York.
Kind of business: Machinery Manufacturers.
Is this a consolidated return? No.

Gross Income

Item and Instruction No.

1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances: $63,371.99.

[fol. 106] 2. Less Cost of Goods Sold:

(a) Inventory at beginning of year: $20,000.00.

(b) Merchandise bought for sale: $11,406.05.

(c) Cost of manufacturing or otherwise producing goods (from Schedule A): $45,924.93.

(d) Total of lines (a), (b), and (c): $77,330.98.

(e) Less inventory at end of year: $77,330.98.

3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2): Less $13,958.99.

4. Gross Profit from Operations Other Than Trading or Manufacturing (State source of income):

(a) ——.

Item and Instruction No.

(b) ——.

(c) ——.

5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds: ——.

6. Rents: ——.

7. Royalties: ——.

8. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (from Schedule B): ——.

9. Dividends on Stock of Domestic Corporations: ——.

[fol. 107] 10. Other Income (including dividends received on stock of foreign corporations) (State nature of income):

(a) ——.

(b) ——.

(c) ——.

11. Total Income in Items 3 to 10: Loss $13,958.99.

Deductions

12. Compensation of Officers (from Schedule C): ——.

13. Rent on Business Property: ——.

14. Repairs (from Schedule D): $576.84.

15. Interest: $3,445.58.

16. Taxes (from Schedule E): $1,885.05.

17. Losses by Fire, Storm, etc. (from Schedule F): ——.

18. Bad Debts (from Schedule G): $9,563.03.

19. Dividends (from Schedule H): ——.

20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (from Schedule I): ——.

21. Depletion of Mines, Oil and Gas Wells, Timber, etc.: ——.

Item and Instruction No.

22. Other Deductions Not Reported Above (explain below, or on separate sheet):

[fol. 108] Loss on final Sale of all Machy. & Equipment: $95,843.26.

(a) Salaries and wages (not included in Item 2, 12, or 14 above): ——.

(b) Advertising: $915.38; Salaries: $7,563.39.

(c) Insurance: $826.02; Traveling Exp.: $1,860.55.

(d) Telegraph & Telephone: $606.50; Expense: $5,-540.35.

(e) Stamps: $292.37; Collection & Exch.: $5.42.—$17,-609.98.

(f) ——.

23. Total Deductions in Items 12 to 22: $128,923.74.

24. Net Income (Item 11 minus Item 23): Loss $142,-882.73.

* * * * * * *

Schedule A—Cost of Manufacturing or Producing Cost (See Instruction 2)

Item.	Amount.
Salaries and wages—Productive Labor	$32,797.88
Material and supplies—Non-Productive Labor	9,419.87
Freight, Expressage & Cartage	412.18
Power	2,450.23
Supplies	844.77
	45,924.93

* * * * * * *

[fol. 109] Schedule D—Cost of Repairs (See Instruction 14)

1. Items	2. Amount (Enter as Item 14)
Salaries and wages	$——

Schedule E—Taxes Paid (See Instruction 16)

1. Items	2. Amount (Enter as Item 16)
Town of Greenwich	$1,227.60
State Tax	20.00
Water Tax	637.45
	$1,885.05

* * * * * * *

[fol. 110]

Page 3 of Return

Schedule K—Balance Sheets (See Instruction 25)

Assets

1. Cash		$1,377.05
2. Notes receivable		7,127.00
3. Accounts receivable		.....
Less reserve for bad debts		12,101.21
4. Inventories:		
Raw materials		.....
Work in process		.....
Finished goods		.....
Supplies		.....
		20,000.00
5. Investments:		
Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia		.....
Securities issued under the Federal Farm Loan Act, or under such Act as amended		.....
Obligations of the United States or its possessions		.....
6. Loans (describe fully): ——.		
7. Deferred charges: ——.		
Prepaid insurance		.....
Prepaid taxes		.....
8. Capital assets:		
Land		12,500.00
Sound Beach Plant		192,953.21
Machinery and equipment		123,553.60
Furniture and fixtures		.....
Delivery equipment		.....
Less reserves for depreciation and depletion		.....

[fol. 111]

9. Patents	.....
10. Good will	.....
11. Other assets (describe fully):	
.....	.....
.....	.....
.....	.....
.....	.....
12. Total Assets	$360,612.07

Liabilities

			(Hubert Dalton)
13. Notes payable		8,500.00	
14. Accounts payable		487,574.08	319,344.74
15. Accrued expenses (describe fully):			
.....		.....	
.....		.....	
.....		.....	
16. Other liabilities (describe fully):			
Mortgage		50,000.00	
17. Capital stock:			
Preferred stock (less stock in treasury)	$100,000.00		
Common stock (less stock in treasury)	295,000.00		
		395,000.00	395,000.00
18. Deficit		571,462.01	714,344.74
19. Undivided profits		.....	
20. Total Liabilities		$369,612.07	

Remarks: ——.

[fol. 112] Page 4 of Return

(Dalton Manufacturing Corp.)

Schedule L—Reconciliation of Net Income and Analysis of Changes in Surplus

1. Net income from Item 24, page 1 of the return: Loss—$142,882.73.

* * * * * * *

8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year: Deficit—$571,462.01.

9. Other credits to surplus (to be detailed):

(a) ——.

(b) ——.

(c) ——.

10. Total of Lines 7 to 9, inclusive: $——.

11. Total from line 17: ——.

12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11): Deficit: $714,344.74.

13. Unallowable deductions:

(a) Donations, gratuities, and contributions: $——.

* * * * * * *

[fol. 113] We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year as stated, pursuant to the Revenue Act of 1924 and the Regulations issued under authority thereof.

Hubert Dalton, President. Sadie Cohan, Asst. Treasurer.

Sworn to and subscribed before me this 14th day of March, 1925. Edward V. Schirmer, (Title) Notary Public, Fairfield County, Conn. (Seal.)

[fol. 114] DEFENDANT'S EXHIBIT B

Complete Tentative Attached

Corporation Income Tax Return

Form 1120 U. S. Internal Revenue (Auditor's Stamp) Audited Files Audit No Tax Due Auditor Eldred. Unit No. — 2 —. Date 3 2 26. Verify Loss	Page 1 of Return (Do not write in these spaces) Serial Number 850174 File Code N. O. First Payment $ —. Examined by —— ——. (Cashier's Stamp) S Cash Check M. O. Cert. of Ind.

For Calendar Year 1923

File this return with the Collector of Internal Revenue for your district on or before March 15, 1924.

Print plainly corporation's name and business address.

Dalton Manufacturing Corporation, Sound Beach, Connecticut.

Date of Incorporation: June 30th, 1917.

Under the laws of what State or Country: New York.

Kind of Business: Machinery Manufacturers.

Is this a consolidated Return? No.

Gross Income

Item and Instruction No.

1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances: $66,820.42.

[fol. 115] 2. Less Cost of Goods Sold:

(a) Inventory at beginning of year	$85,000.00
(b) Merchandise bought for sale	10,458.22
(c) Cost of manufacturing or otherwise producing goods (from Schedule A)	60,296.04
(d) Total of lines (a), (b), and (c)	$155,754.26
(e) Less inventory at end of year	20,000.00
	135,754.26

3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2): Loss $68,933.84.

• • • • • • •

11. Total Income in Items 3 to 10: Loss—$68,933.84.

Deductions

12. Compensation of Officers (from Schedule C): ——.

13. Rent on Business Property: ——.

14. Repairs (from Schedule D): $891.90.

15. Interest: $1,910.67.

Item and Instruction No.

16. Taxes (from Schedule E): $2,356.49.

17. Losses by Fire, Storm, etc. (from Schedule F): ——.

18. Bad Debts (from Schedule G): $749.39.

19. Dividends (from Schedule H): ——.

[fol. 116] 20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (from Schedule I): ——.

21. Amortization of War Facilities: ——.

22. Depletion of Mines, Oil and Gas Wells, Timber, etc.: ——.

23. Other Deductions not Reported Above (explain below, or on separate sheet):

(a) Salaries	$8,004.88
(b) Advertising	1,131.30
(c) Traveling Expense	2,089.11
(d) Stamps	309.44
(e) Collection & Exchange	1.99
Office Supplies	118.71
Telephone & Telegrams	611.06
Insurance	2,742.98
General Expense	4,008.31
Water Tax	167.16
	$22,083.08

24. Total Deductions (Items 12 to 23): $27,087.32.

25. Net Income (Item 11 minus Item 24): [illegible] 320.96.

Computation of Tax:

26. Net Income (Item 25 above): [illegible]

[fol. 117] (Dalton Manufacturing Corp.)

Schedule A.—Cost of Manufacturing or Producing Goods
(See Instruction 2)

Items	Amount
Productive Labor	$43,846.68
Non-Productive Labor	8,224.16
Freight, Express & Cartage	2,088.57
Power	4,299.16
Supplies	1,837.47
	$60,296.04

• • • • • • •

(Schedule D.—Cost of Repairs (See Instruction 14)

1. Items: ——.
2. Amount (Enter as Item 14): $——

Schedule E.—Taxes Paid (See Instruction 16)

1. Items	2. Amount (Enter as Item 16)
State of Connecticut	$15.00
Real Estate Tax	1,220.40
Capital Stock Tax	109.00
N. Y. State Franchise Tax	10.00
	$1,354.40

• • • • • • •

[fol. 118]

Page 3 of Return

Dalton Manufacturing Corp.

Schedule K.—Balance Sheets (See Instruction 26)

Items	Beginning of taxable period		End of taxable period	
	Amount	Total	Amount	Total
1. Cash	.....	$1,051.59	.....	$1,377.05
2. Notes receivable	.....	7,127.00	.....	7,127.00
3. Accounts receivable	$21,836.90	.....	$12,101.21	.....
Less reserve for bad debts	.....	21,836.90	.....	12,101.21
4. Inventories:				
Raw materials	$.....	.....	$.....	.....
Work in process	85,000.00	.....	20,000.00	.....
Finished goods	.....	.....	.....	.....
Supplies	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	85,000.00	.....	20,000.00
5. Investments (describe fully):				
.....	$.....	.....	$.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

Items	Beginning of taxable period		End of taxable period	
	Amount	Total	Amount	Total
6. Loans (describe fully):				
.....	$.....	.....	$.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
7. Deferred charges:				
Prepaid insurance.....	$.....	.....	$.....	.....
Prepaid taxes.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
[fol. 119]				
8. Capital assets:				
Land.....	.....	$25,332.18	.....	$12,500.00
Sound Beach Plant.....	$250,592.90	.....	$192,953.21	.....
Machinery and equipment.....	186,168.61	.....	123,553.60	.....
Furniture and fixtures.....	.....	.....	.....	.....
Delivery equipment.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
	$436,761.51		$316,506.81	

Less reserves for depreciation and depletion....	.....	436,761.51	.....	316,506.81
9. Patents.....	.....	21,500.53	.....	.....
10. Good will.....	.....	28,714.34	.....	.....
11. Other assets (describe fully):				
.....	$.....	.....	$.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
12. Total Assets.....	.....	$627,324.05	.....	$369,612.07

[fol. 120]

Liabilities

13. Notes payable.....	.....	$15,500.00	.....	$8,500.00
14. Accounts payable.....	.....	447,283.90	.....	487,574.08
15. Accrued expenses (describe fully):				
.....	$.....	.....	$.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
16. Other liabilities (describe fully):				
Mortgage.....	$50,000.00	.....	$50,000.00	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	50,000.00	.....	50,000.00

Items	Beginning of taxable period		End of taxable period	
	Amount	Total	Amount	Total
17. Capital stock:				
Preferred stock (less stock in treasury)	$100,000.00	.....	$100,000.00	.....
Common stock (less stock in treasury)	295,000.00	395,000.00	295,000.00	395,000.00
18. Surplus Deficit	$280,459.85	.....	$571,462.01	.....
19. Undivided profits	.....	280,459.85	.....	571,462.01
20. Total Liabilities	.....	$627,324.05	.....	$369,612.07

Remarks .....

[fol. 121] Page 4 of Return

Dalton Manufacturing Corp.

Schedule L.—Reconciliation of Net Income and Analysis of Changes in Surplus

1. Net income from Item 25, page 1 of the return: Loss—$96,521.16.

• • • • • • •

5. Total of Lines 1 to 4, Inclusive: Loss—$96,521.16.

6. Total from Line 14: $214.85.

7. Net profit for year as shown by books, before any adjustments are made therein (Line 5 minus Line 6): Loss—$96,736.01.

8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable period: Deficit—$280,459.85.

• • • • • • •

10. Total of Lines 7 to 9, Inclusive: Deficit—$377,195.86.

11. Total from Line 17: $194,266.15.

12. Surplus and undivided profits as shown by balance sheet at close of taxable period (Line 10 minus Line 11): Deficit—$571,462.01.

13. Unallowable deductions:

(a) Donations, gratuities, and contributions: $214.85.

• • • • • • •

[fol. 122] 14. Total of Line 13: $214.85.

15. Dividends paid during the taxable period (state whether paid in cash, stock of this company, or other property):

(a) Date paid: ——. Character: $——.
(b) Date paid: ——. Character: $——.
(c) Date paid: ——. Character: $——.
(d) Additional Income Tax: $1,081.38.

16. Other debits to surplus (to be detailed):
(a) Adjustment in reduction of values ascertained by appraisals: $142,969.90.
(b) ——.
(c) Write off of patents & good will: $50,214.87.

17. Total of Lines 15 and 16: $194,266.15.

* * * * * * *

[fol. 123] Affidavit

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable period as stated, pursuant to the Revenue Act of 1921 and the Regulations issued under authority thereof.

Hubert Dalton, President. Sadie Cohen, Asst. Treasurer.

Sworn to and subscribed before me this 12th day of June, 1924. Edward S. Schirmer, Notary Public, Fairfield County. (Seal.)

[fol. 124] Defendant's Exhibit C

Extension Granted by Commissioner to May 15, 1924, per Letter Attached

Individual Income Tax Return

Form 1040 U. S. Internal Revenue	(Do not Write in These Spaces)
(Auditor's Stamp) Basis (F. A.) 12/11/24 Audited by J. W. B. Unit No. 502 Date 5/18/25	Serial Number 304911 First Payment $217.78 Examined by FF. (Cashier's Stamp) Col. of Internal Revenue Paid May 15, 1924 Cashier—G Hartford, Conn.

For Net Incomes of More Than $5,000 or Net Incomes, Regardless of Amount, if Derived from a Profession or Business, Including Farming, for Calendar Year 1923

File this return not later than the 15th day of the third month following the close of the taxable period.

(Print name and address plainly below.)

Florence W. Dalton and Hubert Dalton, Shippan Point, Stamford, Connecticut.

Occupation, Profession, or Kind of Business

1. Are you a citizen or resident of the United States? Yes.

[fol. 125] 2. If you filed a return for 1922, to what Collector's office was it sent? Hartford, Connecticut.

3. Is this a joint return of husband and wife? Yes.

• • • • • • •

Income

Item and Instruction No.

1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received): Amount received, $——. Expenses paid (explain in Schedule G): ——.

2. Income from Business or Profession (from Schedule A): ——.

3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds: $4,580.28.

4. Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.): ——.

5. Rents and Royalties (from Schedule B): $30.00.

6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (from Schedule C): ——.

7. Dividends on Stock of Domestic Corporations: $181,274.11.

Item and Instruction No.

8. Taxable Interest on Liberty Bonds, etc. (from Schedule E): ——.

9. Other Income (including dividends received on stock of foreign corporations) (state nature of income): ——.

10. Total Income in Items 1 to 9: $185,884.39.

[fol. 126] Deductions

11. Interest Paid: ——.

12. Taxes Paid: $4,024.07.

13. Losses by Fire, Storm, etc. (explain in Schedule F): ——.

14. Bad Debts (explain in Schedule G): $157,035.50.

15. Contributions (explain in Schedule G): ——.
(a) ——.
(b) ——.
(c) ——.

16. Other Deductions Authorized by Law (explain in Schedule G): ——.

17. Total Deductions in Items 11 to 16: $161,059.57.

18. Net Income (Item 10 minus Item 17): $24,824.82.

Computation of Tax

19. Net Income (Item 18 above): $24,824.82.

20. Less Dividends (Item 7 above): $181,274.11.

21. Taxable Interest on Liberty Bonds, etc. (Item 8 above): ——.

22. Personal Exemption and Credit for Dependents (see Instruction 23): $2,400.00.

23. Total Items 20, 21, and 22: $183,674.11.

• • • • • • •

[fol. 127] 31. Total Tax: $862.48.

32. Less Income Tax paid at source: ——.

Item and Instruction No.

33. Income and profits taxes paid to foreign countries or possessions of the U. S. (attach Form 1116): ——.

34. Balance of Tax (Item 31 minus Items 32 and 33): $862.48.

An amended return must be marked "Amended" at top of return.

Checks and drafts will be accepted only if payable at par.

Int.: $2.16.

Total Due: $864.64.

• • • • • • •

(a) First Liberty Loan Second Converted 4¼% Bonds: $30,000.

(b) Liberty 4% and 4¼% Bonds, Treasury 4¼% Bonds, Treasury Certificates, and Treasury (War) Savings Certificates: $5,000.

(c) Liberty 4% and 4¼% Bonds: $125,000.

(d) Victory 4¾% Notes, and Treasury Notes: None.

(e) Total Taxable Interest (If you bought or sold during year, attach statement showing holdings by periods): $——.

[fol. 128] 3. Amount Owned to July 2, 1923, in Excess of Exemptions Specified in Column 2: $——.

4. Interest to July 2, 1923, on Amount Owned in Excess of Exemption: $——.

5. Exemptions Applicable from July 3, 1923, to End of Taxable Period: ——.

(b) Liberty 4% and 4¼% Bonds, Treasury 4¼% Bonds, Treasury Certificates, and Treasury (War) Savings Certificates: $5,000.

(c) Liberty 4% and 4¼% Bonds: $50,000.

(d) Victory 4¾% Notes and Treasury Notes: None.

6. Amount Owned from July 3, 1923, in Excess of Exemptions Specified in Column 5: $——.

• • • • • • •

Affidavit

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith, for the taxable period as stated, pursuant to the Revenue [fol. 129] Act of 1921 and the Regulations issued and under authority thereof.

(If return is made by agent, the reason therefor must be stated on this line.)

(Signature of individual or agent:) Florence W. Dalton. (Address of individual or agent:) Hubert Dalton.

Sworn to and subscribed before me this 13th day of May, 1924. (Signature of officer administering oath:) Leon Brummer, (Title:) Notary Public.

Schedule "G"—Item "14"

The deduction of $157,035.50 as a bad debt is explained as follows:

The taxpayer, Hubert Dalton, from time to time, loaned to the Dalton Manufacturing Corporation, of Sound Beach, Connecticut, various sums of money, of which $485,646.50 remained due and unpaid at the close of the taxable year 1923. Said taxpayer at no time held any collateral security for the said loan.

[fol. 130] The company, during 1923, ceased operations and took affirmative steps to wind up its business. In April 1923, its Board of Directors passed a resolution to the effect that the business of the company be closed up as soon as possible and the plant and property of the company be sold, and the officers of the company were authorized to offer the plant, machinery, etc., for sale forthwith. A mimeographed letter was sent out by the company to the trade under date of July 12th, 1923, advising that no further orders would be accepted after July 25th, 1923, and that the plant would remain closed until further notice. Factory employees were discharged and only a small personnel retained. Negotiations were carried on with various real estate agents and with others for the sale of the

plant, machinery and equipment. It was deemed advisable to sell the plant in its entirety in order to realize a greater sum than could be obtained by sale piece-meal.

An appraisal of the Dalton Manufacturing Corporation's plant made by the Standard Appraisal Company of New York, shows:

Real Estate	$12,500.00
Building Construction	190,953.21
Underground Pipe	2,000.00
	$205,453.21
Machinery, Equipment Tools, etc.	123,553.60

A financial statement at December 31st, 1923, showing the valuations of Real Estate, Building, Machinery, Plant & Tools as established by such appraisal, is as follows:

[fol. 131] Assets:

Cash	$1,377.05	
Accounts & Notes Receivable	19,228.21	
Inventory	20,000.00	
Sound Beach Plant—Real Estate & Buildings	205,453.21	
Machinery, Equipment and Plant	123,553.60	
Total Assets (with appraisal values)		$369,612.07
Liabilities:		
Accounts and Notes Receivable	$60,427.58	
Hubert Dalton	485,646.50	
Total Liabilities		546,074.08
Excess of Liabilities Over Assets		$176,462.01

which shows that if the Company realizes the full value hereinabove shown, and distributes same proportionately to its creditors, then said taxpayer, Hubert Dalton, will collect for his claim of $485,646.50, the sum of $328,611, leaving a deficiency of $157,035.50, for which amount, at least, his said claim is uncollectible and as such is deductible for such part, pursuant to the provisions of the Revenue Act of 1921, §214-A (7) and Article 151, Regulation 62.

Hubert Dalton.

(Copy)

[fol. 132] Treasury Department, Internal Revenue Service, Hartford, Conn.

Income Tax Div.

Date: March 5, 1924.

Mr. (Mrs.) Hubert Dalton, Sound Beach, Conn.

DEAR SIR (MADAM):

In re Florence W. Dalton & Hubert Dalton

In accordance with your request of recent date an extension of thiry days from March 15th, 1924 is granted in which to render income tax return for the year 1923.

The extension as granted carried an interest charge at the rate of one-half of one per cent a month on the first installment of tax due from March 15th, 1924 to the date of filing the return and paying such installment.

In order to gain benefit of the extension it is necessary that this letter or a copy of same accompany the return when filed.

Yours truly, Robert O. Eaton, Collector.

B:M.

[fol. 133] (Copy)

Treasury Department, Washington, Office of Commissioner of Internal Revenue

April 15, 1924.

Mr. Hubert Dalton, Shippen Point, Stamford, Connecticut.

SIR: Receipt is acknowledged of your letter under date of April 11, 1924, requesting an extension of thirty days from April 15th in which to file a joint return of net income for yourself and wife, Florence W. Dalton, for the year 1923.

The reasons assigned for the request is the extreme illness of Mrs. Dalton, and the fact that you have been unable to prepare your return since certain data relating to the Dalton Manufacturing Corporation is not available at the present time.

It is understood that a previous extension to April 15, 1924, had been secured from the Collector of Internal Revenue.

In view of the circumstances an extension of time to May 15, 1924, is hereby granted. This also postpones the time for payment of the first installment of tax which will bear interest at the rate of one-half of one per centum from [fol. 134] the time it would have been due if no extension had been requested until May 15, 1924, or until actually paid if paid before May 15, 1924.

A copy of this letter should be attached to the return when filed.

Respectfully, D. H. Blair, Commissioner.

[fol. 135] DEFENDANT'S EXHIBIT D

Washington

Individual Income Tax Return

Form 1040 U. S. Internal Revenue	(Do not Write in These Spaces)
(Auditor's Stamp) Tax Liability Reduced $266.05 Basis (F. A.) or (O. A.) R. A. R. 11/16/27 Audited by N. F. Unit No. F. A. R.-B. 3 Date 12/20/27	File Code 95 Serial Number 901265 First Payment $266.05 Examined by S. (Cashier's Stamp) Col. of Int. Revenue Paid Mar. 18, 1925

For Net Incomes of More than $5,000 or Net Incomes, Regardless of Amount, if Derived from a Profession or Business, Including Farming, for Calendar Year 1924.

If your income is computed on a fiscal-year basis, or income is received from a partnership or fiduciary computed on a fiscal-year basis, form 1040FY should be secured from the collector and filed in lieu of this form.

File this return with the Collector of Internal Revenue for your district on or before March 15, 1925.

(Print name and address plainly below.)

Florence W. Dalton & Hubert Dalton, Shippan Point, Connecticut.

Occupation, Profession, or Kind or Business

1. Are you a citizen or resident of the United States? Yes.

[fol. 136] 2. If you filed a return for 923, to what Collector's office was it sent? Hartford, Conn.

3. Is this a joint return of husband and wife? Yes.

4. Were you married and living with husband or wife on the last day of your taxable year? Yes.

5. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you by blood, marriage, or adoption? ——.

6. If your status in respect to questions 4 and 5 changed during year, state date of such change? ——.

7. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? One.

Income

Item and Instruction No.

1. Salaries, Wages, Commissions, etc. (state name and address of person from whom received): Amount received, $——. Expenses paid (explain in Schedule F). $——.

2. Income from Business or Profession (from Schedule A): ——.

3. Interest on Bank Deposits, Corporation Bonds, etc. (except interest upon which a tax was paid at source): $3,097.92.

[fol. 137] (a) Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source: ——.

4. Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.): ——.

Item and Instruction No.

5. Rents and Royalties (from Schedule B): $162.50.

6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (from Schedule C): ——.

7. Dividends on Stock of Domestic Corporations: $183,505.09.

8. Taxable Interest on Liberty Bonds, etc. (from Schedule E): ——.

9. Other Income (including dividends received on stock of foreign corporations (state nature of income):
(a) ——.
(b) ——.
(c) ——.

10. Total Income in Items 1 to 9: $186,765.51.

Deductions

11. Interest Paid: $——.

12. Taxes Paid (explain in Schedule F): $3,535.25.

13. Losses by Fire, Storm, etc. (explain in Table on page 2): ——.

14. Bad Debts (explain in Schedule F): Dalton Mfg. Corp., $162,309.24.

[fol. 138] 15. Contributions (explain in Schedule F). ——.

16. Other Deductions Authorized by Law (explain below or on separate sheet): ——.
(a) ——.
(b) ——.
(c) ——.

17. Total Deductions in Items 11 to 16: $165,844.49.

18. Net Income (Item 10 minus Item 17): $20,921.02.

Computation of Tax

* * * * * * *

30. Net Income (Item 18 above): $20,921.02.

Item and Instruction No.

31. Less Dividends (Item 7 above): $183,505.09.

32. Interest on Liberty Bonds, etc. (Item 8): ——.

33. Personal Exemption: $2,500.00.

34. Credit for Dependents: $400.00.

35. Total of Items 31, 32, 33, and 34: $186,405.09.

36. Balance (Item 30 minus 35): None.

37. Amount taxable at 2% (not over the first $4,000 of Item 36): ——.

38. Balance (Item 36 minus 37): None.

39. Amount taxable at 4% (not over the second $4,000 of Item 36): ——.

40. Amount taxable at 6% (balance over $8,000 of Item 36): None.

[fol. 139] 41. Normal Tax (2% of Item 37): None.

42. Normal Tax (4% of Item 39): None.

43. Normal Tax (6% of Item 40): None.

44. Surtax on Item 18 (see Instruction 30): $266.05.

45. Adjustment for Capital Gain or Loss (12½% of Column 9, Schedule D): ——.

46. Total of Items 41 to 45: $266.05.

47. Less Credit of 25% of Tax on Earned Net Income (Item 29): ——.

48. Total Tax (Item 46 minus 47): $266.05.

49. Less Income Tax paid at source: ——.

50. Income and Profits Taxes paid to a foreign country or U. S. possession: ——.

51. Balance of Tax (Item 48 minus Items 49 and 50): $266.05.

An amended return must be marked "Amended" at top of return.

Checks and drafts will be accepted only if payable at par.

* * * * * * *

ScheduleB—Income from Rents and Royalties (See Instruction 5)

1. Kind of Property: Wooden Houses.

2. Amount Received: $1,080.00.

3. Cost: $——.

[fol. 140] 4. Value as of March 1, 1913: $——.

5. Depreciation (explain in table at foot of page): $650.00.

6. Repairs: $267.50.

7. Other Expenses (itemize below): $——.

8. Net Income (enter as Item 5): $162.50.

* * * * * * *

Schedule E—Interest on Liberty Bonds and Other Obligations or Securities (See Instruction 8)

* * * * * * *

2. Interest Received or Accrued: $1,000.00.

3. Amount Owned: $25,000.00.

4. Principal Amount Exempt from Taxation: All ——, All ——, All ——, $5,000, $50,000, None.

* * * * * * *

[fol. 141] Schedule F—Explanation of Deductions Claimed in Items 1, 12, 14, and 15

Real Estate Taxes	$3,291.65
Tax on Club Dues	80.00
Auto Licenses	163.60
	$3,535.25

Affidavit

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been

examined by me, and, to the best of my knowledge and belief is a true and complete return made in good faith for the taxable year as stated, pursuant to the Revenue Act of 1924 and the Regulations issued under authority thereof.

.....

(If return is made by agent, the reason therefor must be stated on this line.)

Hubert Dalton.

Sworn to and subscribed before me this 14th day of March, 1925. Sanford Becker, Notary Pubilc.

[fol. 142] Order Settling Bill of Exceptions

After hearing counsel for plaintiff and defendant and on motion of George Z. Medalie, United States Attorney for the Southern District of New York, attorney for the defendant, I have settled, allowed and signed the foregoing as the defendant's bill of exceptions in the within action.

Dated New York, September 14, 1931.

Francis G. Caffey, U. S. D. J.

[fol. 143] In United States District Court

[Title omitted]

Order Extending Term of District Court to July 14, 1931

Upon reading and filing the annexed consent, and on motion of George Z. Medalie, United States Attorney for the Southern District of New York, it is

Ordered that the March, 1931 Term of this Honorable Court be and the same hereby is extended to and including the 14th day of July, 1931, for the purpose of filing Bill of Exceptions in the above entitled action.

Dated June 23, 1931.

Charles Weiser, Clerk.

[fol. 144] We hereby consent to the entry of the above order without further notice. No further extension to be requested or granted.

June 23, 1931.

Arnold Lichtig & Herbert A. Mossler, Attorney- for Plaintiff. George Z. Medalie, United States Attorney, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TERM OF DISTRICT COURT TO AUGUST 15, 1931

Upon reading and filing the annexed affidavit of Leon E. Spencer, Assistant United States Attorney, and after hear-[fol. 145] ing Herbert Mossler, Esq., in opposition thereto and on motion of George Z. Medalie, United States Attorney for the Southern District of New York, it is

Ordered that the March, 1931 Term of this Honorable Court be and the same hereby is extended to and including the 15th day of August, 1931 for the purpose of filing the Bill of Exceptions in the above entitled action.

Dated July 10, 1931.

Woolsey, U. S. D. J.

Filed July 10/31.

[fol. 146] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LEON E. SPENCER

STATE OF NEW YORK,
County of New York, ss:

Leon E. Spencer, being duly sworn, deposes and says: That he is an Assistant United States Attorney for the Southern District of New York and as such has charge of the defendant's rights in the above entitled action. That

this case came on for trial before Hon. Francis G. Caffey, United States District Judge, on the 19th and 20th days of March, 1931, and at the conclusion of the trial the Court directed a judgment in favor of the plaintiff for $56,871.32 and interest. That judgment was entered in favor of the plaintiff for said sum on March 26, 1931. That on April 25, [fol. 147] 1931 deponent recommended to the Attorney General recommending that an appeal be taken from the aforesaid judgment to the United States Circuit Court of Appeals. That deponent as Assistant United States Attorney has been instructed by the Attorney General in all cases where the decision of the Solicitor General of the United States on the question as to whether an appeal from the judgment has not been received, within the time within which the appeal must be perfected, to take the appeal and request an appropriate extension of time to file the Bill of Exceptions. That deponent has not been advised of the decision of the Solicitor General as to whether an appeal should be taken from the judgment in this case. That on June 15, 1931 deponent caused an appeal to be taken from the judgment entered in this case on March 26, 1931, and on June 23, 1931 the Clerk of the District Court on the consent of the attorneys for plaintiff and defendant extended defendant's time to file the Bill of Exceptions to July 14, 1931. That the attorneys for the plaintiff refuse to consent to any further extension of the term of this Court for the purpose of filing the Bill of Exceptions. That until deponent is advised of the Solicitor General's decision that an appeal is to be perfected he is powerless to file a bill of exceptions.

Wherefore deponent prays for an order directing that the term of this Court be extended to August 15, 1931 for [fol. 148] the purpose of filing the Bill of Exceptions in the above entitled action.

Leon E. Spencer.

Sworn to before me this 10th day of July, 1931. Armand Chankalian, Notary Public, New York Co. Clerk's No. 389, Reg. No. 3C426. Commission expires March 30, 1933.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO VACATE ORDER EXTENDING TERM

SIR: Please take notice that upon the annexed affidavit of Herbert A. Mossler, duly verified, the order in this ac-
[fol. 149] tion dated June 24th, 1931 and the stipulation upon which said order was made, dated June 23, 1931, the order dated July 10th, 1931, and the affidavit of Leon E. Spencer, Esq., upon which said order was made, and upon the judgment herein entered March 26th, 1931, a motion will be made at a stated term of this Court held at the Court Room of this Court in the U. S. Court and P. O. Building, Broadway and Mail Streets, Manhattan Borough, New York City, on the 21st day of July, 1931 at 10:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard for an order vacating and setting aside the order of this Court dated July 10th, 1931 extending the March, 1931 Term of this Court to August 15th, 1931 for the purpose of filing Bill of Exceptions herein, and for such other and further relief in the premises as may be just and proper.

Dated New York, July 15th, 1931.

Yours, etc., Arnold Lichtig & Herbert A. Mossler, Attorneys for Plaintiffs, 521 Fifth Avenue, New York City.

To George Z. Medalie, Esq., Attorney for Defendant, U. S. Court & P. O. Bldg., New York City.

[fol. 150] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE

STATE OF NEW YORK,
County of New York, ss:

Herbert A. Mossler, being duly sworn, deposes and says: I am one of the attorneys for the plaintiffs herein.

On March 26th, 1931, judgment was entered herein in favor of the plaintiffs and against the defendant and on the

same day a copy of said judgment, with notice of entry thereof, was served upon the attorney for the defendant.

Defendant's petition for appeal was allowed herein on June 15th, 1931 and a citation was issued, returnable herein on the 14th day of July, 1931.

[fol. 151] The March, 1931 Term of this Court, for the purpose of filing Bill of Exceptions in this action, was to have expired on June 26th, 1931.

Three days prior thereto and on June 23rd, 1931, by stipulation between the attorneys, the March, 1931 Term was extended to and including July 14th, 1931 for the purpose of filing such Bill of Exceptions. An order thereon was entered on June 24th, 1931.

The aforesaid order was entered upon the stipulation signed by the attorneys in this action, as follows:

"We hereby consent to the entry of the above order without further notice. No further extension to be requested or granted.

July 23rd, 1931.

Arnold Lichtig & Herbert A. Mossler, Attorneys for Plaintiffs. George Z. Medalie, U. S. Attorney, for Defendant."

The agreement that no further extension "to be requested or granted," was arranged orally and agreed upon as a condition for the stipulation prior to the signing thereof. It was thereupon included in the stipulation and defendant's attorney entered the order thereon.

Notwithstanding such agreement and stipulation and notwithstanding that the term was extended solely on defendant's agreement that no further extension would be [fol. 152] requested or granted, on July 10th, 1931, defendant applied for and procured ex-parte a further extension of the term to August 15th, 1931.

When I learned that defendant's attorney would apply for such further extension, I requested that it be done on the usual notice of motion, but my request was refused although I received a telephone message on July 10, 1931, at 11:30 A. M. to the effect that defendant's attorney would make the ex-parte application to Judge Woolsey at Chambers at 3:00 P. M. on the same day. I appeared before Judge Woolsey in Chambers and requested that the application be made on notice so that I could prepare papers in

opposition. My request was denied and the order signed on the affidavit submitted by defendant's attorney, which affidavit made no reference to the fact that a prior extension had been granted upon the agreement of defendant's attorney that no further extension would be requested or granted.

Judge Woolsey in signing the ex-parte order stated that a motion could be made to vacate his order, before any other Judge, and that the matter need not be referred to him but he desired such other Judge to pass upon the application on the papers on which it was made. The present application is made in accordance with such permission.

I refer hereto and make part hereof the order signed by the Clerk of this Court, dated June 24th, 1931, extending the term to July 14th, 1931, appended to which is the stipulation of June 23rd, 1931, upon which said order was entered, and I also refer to and make part hereof the order dated July 10th, 1931, further extending the said term to [fol. 153] August 15th, 1931, together with the affidavit of Leon E. Spencer, Esq., upon which said order was based, all of which are on file in the office of the Clerk of this Court.

I therefore ask that an order be made herein vacating and setting aside the order of this Court dated July 10th, 1931, extending the March, 1931, Term of this Court to August 15th, 1931, for the purpose of filing Bill of Exceptions herein.

Herbert A. Mossler.

Sworn to before me this 15th day of July, 1931.
Morris Holman, Notary Public, New York County, No. 445.

[fol. 154] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN OPPOSITION TO MOTION TO VACATE

Leon E. Spencer, being duly sworn, deposes and says that he is an Assistant United States Attorney in and for the Southern District of New York and as such has charge of the defendant's case in the above-entitled action.

That deponent refers to his affidavit dated July 10, 1931, heretofore presented to this Court on application for an order extending the term of this Court for the purpose of filing the Bill of Exceptions and makes such affidavit a part hereof as though fully incorporated herein. That some days prior to June 23, 1931, and on or about June 15, 1931, deponent signed a consent for the entry of an order extending the term of the court for the purpose of filing the proposed bill and sent it to plaintiff's attorneys for their consent. Mr. Arnold Lichtig, one of the plaintiff's attorneys, [fol. 155] signed the stipulation of consent to the entry of the aforesaid order, however inserting the words, "No further extension to be requested or granted." There was no such condition agreed to by deponent, or as Mr. Herbert A. Mossler in his affidavit contends, namely, that deponent was foreclosed against asking the Court for a further extension of the Term within which to file the defendant's Bill of Exceptions. When deponent was apprised of the note made upon the aforesaid stipulation he considered it as an expression of a determination on the part of the plaintiff's attorneys against granting any further extensions of time for the deponent to file his Bill of Exceptions. On July 6th, 1931, deponent having been unable to ascertain from the Solicitor General whether the appeal of the United States heretofore taken was to be perfected, spoke with Mr. Mossler, one of the plaintiffs' attorneys, by telephone, and advised him that no authority had been granted to perfect the appeal heretofore taken in this case and that if no authority was so received prior to July 10, 1931, deponent would apply ex parte to Judge Woolsey for an order extending the term of this Court for the purpose of filing defendant's Bill of Exceptions. Mr. Mossler stated that he would like to oppose deponent's contemplated application and requested that he be advised of the hour and place of such application. Deponent then advised Mr. Mossler that such application for an order extending the term of the District Court for the purpose of filing the defendant's Bill of Exceptions would be made to Judge Woolsey on Friday, July 10, 1931, in the event that such authority for the perfec- [fol. 156] tion of the defendant's appeal had not then been received. Having no such authority on the morning of July 10, 1931, deponent spoke with Mr. Mossler by telephone and informed him that he would apply to Judge Woolsey

at his chambers in the afternoon of that day at 3 P. M. for an order extending the term of the Court for the purpose of filing defendant's Bill of Exceptions. Mr. Mossler responded that he would appear before Judge Woolsey in opposition to such application and he so appeared. Judge Woolsey granted deponent's application for the aforementioned order extending the term of the Court for the purpose of filing the defendant's Bill of Exceptions and expressed the feeling that the Court had jurisdiction of deponent's application to extend the term of the Court as aforementioned.

This affidavit is presented in opposition to Mr. Mossler's affidavit verified July 15, 1931.

Deponent respectfully requests that the plaintiff's application be denied.

Leon E. Spencer.

Subscribed and sworn to before me this 21st day of July, 1931. Armand Chankalian, Notary Public.

[fol. 157] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION TO VACATE ORDER EXTENDING TERM—July 24, 1931

A motion having been regularly made by the plaintiffs above-named for an order vacating and setting aside the order of this Court dated July 10, 1931 extending the March, 1931 Term of this Court to August 15, 1931 for the purpose of filing the Bill of Exceptions in this case, and the said motion having come on for argument before a term of this Court on July 21, 1931 and the Court having heard Herbert [fol. 158] A. Mossler, of counsel for the plaintiffs, and George Z. Medalie, United States Attorney for the Southern District of New York, by Leon E. Spencer, Assistant United States Attorney, counsel for the defendant,

Now, on reading and filing the judgment of this Court dated March 26, 1931 and the order of this Court dated June 23, 1931, extending the term of this Court for the purpose of filing the Bill of Exceptions to July 14, 1931,

and the consent upon which that order was made and the notice of motion dated July 15, 1931, seeking the vacation of the order of this Court dated July 10, 1931; and the affidavit of Herbert A. Mossler, verified the 15th day of July, 1931 in support of said notice of motion; and the affidavit of Leon E. Spencer, Assistant United States Attorney, in opposition to said motion; and the order of this Court dated July 10, 1931 granting an extension of the term of this Court for the purpose of filing the defendant's bill of exceptions, and the affidavit of Leon E. Spencer, Assistant United States Attorney, upon which said last-named order was based,

Now, on motion of George Z. Medalie, United States Attorney for the Southern District of New York, attorney for the defendant, it is hereby

Ordered that the aforesaid motion brought to vacate the order of this Court dated July 10, 1931 be and the same hereby is in all respects denied.

Robert P. Patterson, U. S. D. J.

[fol. 159] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TERM OF DISTRICT COURT TO SEPTEMBER 15, 1931

Upon reading and filing the annexed affidavit of Leon E. Spencer, Assistant United States Attorney, and on motion of George Z. Medalie, United States Attorney for the Southern District of New York, it is

Ordered that the March, 1931 Term of this Honorable Court be and the same hereby is extended to and including the 15th day of September, 1931, for the purpose of filing the Bill of Exceptions in the above-entitled action.

Dated August 14, 1931.

J. W. Mack, U. S. C. J.

Filed August 17, 1931.

[fol. 160] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF LEON E. SPENCER

STATE OF NEW YORK,
County of New York, ss:

Leon E. Spencer, being duly sworn, deposes and says: That he is an Assistant United States Attorney for the Southern District of New York and as such has charge of the defendant's case in the above-entitled action; that judgment was entered in this case on March 26, 1931; that the term of this Court for the purpose of filing the defendant's bill of exceptions has been extended by an order of this Court to the 15th day of August, 1931; that deponent has been directed to perfect an appeal on behalf of the defendant in the above-entitled case and an appeal has been properly taken; that the defendant's proposed bill of exceptions [fol. 161] was submitted to Arnold Lichtig and Herbert A. Mossler, at their office at 521 Fifth Avenue, New York, N. Y., on the 8th day of August, 1931; that plaintiffs' attorneys have declined to consent to the extension of the term of this Court for the purpose of filing the defendant's bill of exceptions and have declined to consent to the entry of an order in this case allowing the defendant's bill of exceptions as proposed. That Judge Caffey, before whom this case was tried, is at present out of the City and Southern District of New York and it may be impossible to reach him for several days with the request that he allow the defendant's bill of exceptions as proposed.

Wherefore deponent prays for an order extending the March, 1931 Term of this Court for the purpose of filing the defendant's bill of exceptions to September 15, 1931.

Leon E. Spencer.

Subscribed and sworn to before me this 12th day of August, 1931. Armand Chankalian.

[fol. 162] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO VACATE ORDER EXTENDING TERM

SIR: Please take notice that upon the annexed affidavit of Herbert A. Mossler, duly verified, and the papers therein referred to and made part thereof, a motion will be made at a stated term of the United States District Court for the Southern District of New York, held at the U. S. Court and Post Office Building, Broadway & Mail Streets, Manhattan Borough, New York City, on the 25th day of August, 1931 at 10:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, for an order vacating and setting aside the order of Judge Julian W. Mack filed and entered in the office of the Clerk of this Court on August 17th, 1931, and for such other and further relief in the prem-
[fol. 163] ises as may be just and proper.

Dated New York, August 21, 1931.

Yours, etc., Arnold Lichtig and Herbert A. Mossler, Attorneys for Plaintiffs. Office & P. O. address: 521 Fifth Avenue, New York City.

To George Z. Medalie, Esq., U. S. Attorney, Attorney for Defendant, U. S. Court & P. O. Bldg., New York City.

[fol. 164] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE

STATE OF NEW YORK,
County of New York, ss:

Herbert A. Mossler, being duly sworn, deposes and says: I am one of the attorneys for the plaintiffs and am familiar with all proceedings herein.

This motion is made to vacate the order of Judge Julian W. Mack, extending the March, 1931 Term of this Court for the purpose of filing the Bill of Exceptions, which order bears date August 14th, 1931 but was not filed or entered

in the office of the Clerk of this Court until August 17th, 1931, after the said March, 1931 Term had expired, upon the following grounds:

[fol. 165] (a) That the said order was applied for and procured contrary to and in violation of a written stipulation dated June 23rd, 1931 and by failure to disclose to the Judge who issued said order that such written stipulation existed.

(b) That at the time said order was filed and entered, the March, 1931 Term of this Court had expired.

The facts are as follows: On March 26th, 1931 a judgment was duly entered herein in favor of the plaintiffs and against the defendant for the sum of $56,841.32 with interest from September 10, 1928, after trial before Judge Francis G. Caffey and a jury of one.

Pursuant to Rule V of the Rules of this Court, the term expired ninety days thereafter, to wit, on June 26th, 1931.

Prior to such expiration and on June 23rd, 1931, a stipulation was entered into between the attorneys for the respective parties hereto, by which it was consented that an order be entered extending the March, 1931 Term to July 14th, 1931, with the written understanding therein set forth that no further extension of the term was to be requested or granted. Annexed hereto and made part hereof is a copy of the said order and stipulation, the pertinent words of said stipulation being as follows:

"We hereby consent to the entry of the above order without further notice. *No further extension to be requested or granted.*"

[fol. 166] On June 24th, 1931 an order extending the March, 1931 Term of this Court to July 14th, 1931 was entered pursuant to the foregoing stipulation.

On or about July 10th, 1931, in violation of said stipulation that there was "no further extension to be requested or granted," defendant applied ex parte to Judge John M. Woolsey and procured the order dated and entered July 10th, 1931 extending the said Term to August 15th, 1931. Plaintiffs moved to vacate said order but the motion was denied by Judge Robert P. Patterson by order dated and entered July 24th, 1931.

Again in violation of said stipulation that there was "no further extension to be requested or granted" defendant applied ex parte to Judge Julian W. Mack and procured the order purporting to extend the March, 1931 Term of this Court to September 15th, 1931. In applying for said order, Leon E. Spencer, Esq., defendant's counsel, submitted his affidavit verified August 12th, 1931 in which he failed to apprise the Court of the existence of said stipulation, and said order was based on said affidavit without the Court being informed therein that such stipulation existed between the parties hereto. Said order, which is hereby sought to be vacated, although, bearing date August 14th, 1931, was filed and entered in the office of the Clerk of this Court on August 17th, 1931, two days after the full expiration of the March, 1931 Term.

The New York Law Journal of August 18th, 1931 contains a notation that said order was signed.

[fol. 167] On August 17th, 1931, at about 12:45 P. M., the Clerk of this Court, at my request, after careful examining the records and orders on file in his office, duly issued his Certificate made and dated August 17th, 1931, a photostatic copy of which is hereto annexed and made part hereof. By said certificate, the Clerk certified that up to the time of the making thereof, which was shortly before 1:00 P. M., on August 17th, 1931, no order extending the term of this Court beyond August 15, 1931 was filed or entered in his office. The order sought to be vacated was filed, according to an endorsement appearing thereon, at 1:53 P. M. on that day. When the Clerk issued said certificate and delivered it to me, Mr. Connell of the Clerk's office, told me he was going to speak to Mr. Spencer about the fact that such certificate had been issued. The following day when I spoke to said Clerk, he said that Mr. Spencer when informed of the fact that the said certificate had been issued, told him that Judge Mack had signed the order on Friday, August 14th, 1931 and that Mr. Spencer had the order in his office since that time and he, Mr. Spencer, could not understand why his office had not filed and entered the same in the office of the Clerk of this Court.

From the foregoing, it appears that while the said order sought to be vacated was signed on August 14th, 1931, the defendant's attorney failed and neglected to file and enter the said order in the office of the Clerk of this Court before

the expiration of the Term and that no such order was entered until two days after the Term had fully expired.

[fol. 168] I refer to and make part hereof the papers herein referred to and particularly the following original papers, all of which are on file in the office of the Clerk of this Court:

Stipulation dated June 23, 1931 and order entered thereon, dated June 24, 1931.

Order of Judge John M. Woolsey, dated July 10th, 1931 and affidavit upon which it is based.

Order of Judge Robert P. Patterson, dated July 24th, 1931 and the affidavits and papers upon which it is based.

Order of Judge Julian W. Mack, filed and entered herein on August 17, 1931 and the affidavit upon which it is based.

I therefore ask that the order of Judge Julian W. Mack, filed and entered herein on August 17th, 1931 be vacated and set aside.

Herbert A. Mossler.

Sworn to before me this 21st day of August, 1931. M. V. Arington, Notary Public. Kings Co. Clerk's No. 312, Register's No. 3160. New York Co. Clerk's No. 225, Reg. No. 3A172. Commission expires March 30, 1933.

[fol. 169] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF CLERK OF DISTRICT COURT ANNEXED TO THE AFFIDAVIT OF HERBERT A. MOSSLER, DATED AUGUST 21, 1931

Upon reading and filing the annexed consent, and on motion of George Z. Medalie, United States Attorney for the Southern District of New York, it is

Ordered that the March, 1931 Term of this Honorable Court be and the same hereby is extended to and including the 14th day of July, 1931, for the purpose of filing Bill of Exceptions in the above entitled action.

Dated June 24th, 1931.

Charles Weiser, Clerk.

[fol. 170] We hereby consent to the entry of the above order without further notice. No further extension to be requested or granted.

June 23, 1931.

Arnold Lichtig and Herbert A. Mossler, Attorneys for Plaintiff. George Z. Medalie, United States Attorney, Attorney for Defendant.

[fol. 171] IN UNITED STATES DISTRICT COURT

[Title omitted]

CERTIFICATE OF THE CLERK OF THE DISTRICT COURT ANNEXED TO THE AFFIDAVIT OF HERBRT A. MOSSLER, DATED AUGUST 21, 1931

STATE OF NEW YORK,
County of New York, ss:

I, Charles Weiser, Clerk of the above-named Court, do hereby certify that the records of this office show as follows: an appeal was taken on June 16th, 1931 by the defendant in the above-entitled action from the judgment entered herein on March 26th, 1931.

That by order filed on June 24th, 1931, the said term of this Court for the purpose of filing the Bill of Exceptions herein was extended to July 14th, 1931.

That by order filed on July 10th, 1931, the said term of this Court for the purpose of filing the Bill of Exceptions [fol. 172] herein, was extended to August 15th, 1931.

That the time to take such action has not been further enlarged or extended; that no Bill of Exceptions has been settled or filed herein, and that I have not certified to the United States Circuit Court of Appeals for the Second Circuit any transcript record for said appeal.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York of the Southern District of New York this 17th day of August, in the year of our Lord One Thousand Nine Hundred and Thirty-one and of the Independence of the said United States, the One Hundred and Fifty-sixth.

Charles Weiser, Clerk. (Seal.)

[fol. 173] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN OPPOSITION TO MOTION TO VACATE

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Leon E. Spencer, being duly sworn, deposes and says, that he is an Assistant United States Attorney for the Southern District of New York, and is in charge of the defendant's case in the above entitled action and makes this affidavit in opposition to the one made by Herbert A. Mossler, dated August 21, 1931.

That a trial was had in this action in March, 1931 and the judgment herein was entered on March 26, 1931 in favor of the above entitled plaintiffs and against the above entitled defendant for the sum of $56,841.32.

[fol. 174] Deponent refers to and makes a part hereof, as if fully set forth herein his affidavit dated July 21, 1931. Prior to the expiration of the term of this Court for the allowance of the defendant's bill of exceptions herein, deponent caused to be presented to plaintiffs' attorneys at their office, 521 Fifth Avenue, New York City, a consent to the entry of an order extending the term of this Court for the purpose of filing the defendant's bill of exceptions to July 14, 1931. Plaintiffs' attorneys signed the said consent on June 23, 1931 and an order was signed by the Clerk of the District Court extending the term of the Court to July 14, 1931. There was added by one of the plaintiffs attorneys to the said consent the words "no further extension to be requested or granted." Deponent did not consent to the adding to the aforesaid consent the words "no further extension to be requested or granted" and to the contrary, informed Mr. Mossler before the application or consent was submitted to that office, that the Solicitor General had not authorized any appeal and if such authorization was not received prior to the 14th of July, 1931, a further application would necessarily have to be made for another extension of the term of the Court to enable the filing of the defendant's bill of exceptions. On July 10, 1931 no authori-

zation to appeal having been received from the Solicitor General, deponent advised Mr. Mossler, one of the plaintiffs' attorneys, deponent would apply to Judge Woolsey at his Chambers, 233 Broadway, for an order further extending the term of the Court for the filing of the defendant's bill of exceptions. Mr. Mossler stated that he would appear [fol. 175] before Judge Woolsey in opposition to deponent's application. Mr. Mossler did appear before Judge Woolsey and argued in opposition to deponent's application for an extension of the term of the District Court to August 15, 1931 for the filing of defendants' bill of exceptions.

Judge Woolsey overruled Mr. Mossler's objection and signed an order extending the term of the Court to August 15, 1931. Mr. Mossler, one of plaintiffs' attorneys, then made a motion to vacate the order of Judge Woolsey dated July 10, 1931 on the same grounds in part as are relied on to support the application now made to vacate the order of Judge Mack dated August 14, 1931. The aforesaid motion to vacate the order of Judge Woolsey was denied by Judge Patterson. On July 23, 1931, deponent was advised by the Attorney General that the Solicitor General had approved an appeal to the Circuit Court of Appeals from the judgment of the District Court dated March 26, 1931, and directed that steps be taken accordingly. Deponent immediately on receipt of the said instructions from the Attorney General by telephone, communicated with the office of the plaintiffs' attorneys and spoke with Mr. Mossler and requested that he send at once to deponent copies of Plaintiffs' Exhibits No. 1, 2 and 3 so as to enable the proper preparation of the defendants' bill of exceptions. On July 31, 1931 deponent received copies of Plaintiffs' Exhibits Nos. 1, 2 and 3. On August 10, 1931 deponent submitted to plaintiffs' attorneys the defendants' proposed bill of exceptions for their consent to allowance. On August 12, Mr. Mossler stated to deponent that he could not consent to the allow- [fol. 176] ance of the bill of exceptions as prepared by the deponent. Deponent thereupon noticed the defendant's proposed bill of exceptions for settlement signature and allowance by the Court for August 13, 1931 at 10:30 o'clock in the forenoon. In opposition to the allowance of defendant's bill of exceptions, the plaintiffs' attorneys served on deponent and filed with the District Court Clerk's Office a

notice of plaintiffs' proposed amendments to the bill of exceptions dated August 13, 1931. Deponent then discovered that Judge Caffey, before whom the above entitled case was tried, was not in the Southern District of New York and that his then present whereabouts were unknown. Deponent thereupon prepared another affidavit and order for a further extension of the term of the District Court to September 15, 1931 to file the defendant's bill of exceptions. Deponent thereupon and on August 12, 1931 advised Mr. Mossler that he would apply to Circuit Judge Mack, sitting in the motion term of the District Court for the Southern District of New York for either (1) the allowance of the defendant's bill of exceptions as submitted, or (2) an order further extending the term of the District Court to September 15, 1931 for the filing of the defendant's bill of exceptions. Mr. Mossler thereupon stated that he would not care to be present before Circuit Judge Mack when such application was made. Deponent thereafter and at 10 o'clock on August 14, 1931 applied to Circuit Judge Mack at his Chambers, Woolworth Building, to either allow the defendant's bill of exceptions or make and sign an order extend-
[fol. 177] ing the term of the District Court to September 15, 1931 to file the defendant's bill of exceptions. Circuit Judge Mack stated that he would not pass upon the defendant's bill of exceptions and he further stated that he would allow a further extension of the term of the Court, and Circuit Judge Mack did thereupon sign an order further extending the term of the District Court and handed the order to deponent, who thereupon returned to his office in the Old P. O. Building and gave the said signed order and the thereto annexed affidavit to Mr. Armand Chankalian in charge of the Clerk's Office of the Civil Division of the United States Attorney's office and requested that it be filed in the Clerk's Office of the District Court. Through an oversight and inadvertence, the said order was not filed in the District Court Clerk's Office until August 17, 1931. The District Court Clerk's certificate signed by Charles Weiser, which is annexed to plaintiff's moving papers herein, was made and allowed without advising deponent of the application therefor.

Wherefore deponent prays that plaintiff's motion dated August 21, 1931 be denied and for such other different and further relief as may be proper.

Leon E. Spencer.

Subscribed and sworn to before me this 24th day of August, 1931. Armand Chankalian, Notary Public, New York Co. Clerk's No. 339, Reg. No. 3C428. Commission expires March 30, 1933. (Seal.)

[fol. 178] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION TO VACATE ORDER EXTENDING TERM—Sept. 1, 1931

A motion having been regularly made by the plaintiffs above named for an order vacating and setting aside the order of this Court dated August 14, 1931, extending the March, 1931 Term of this Court to September 15, 1931 for the purpose of the filing of the defendant's bill of exceptions in this case and said motion having come on for argument before a term of this Court on August 28, 1931 and the [fol. 179] Court having heard Herbert A. Mossler, of counsel for the plaintiffs, and George Z. Medalie, United States Attorney for the Southern District of New York, by Leon E. Spencer, Assistant United States Attorney, counsel for the defendant in opposition to the motion,

Now, on reading and filing the judgment of this Court dated March 26, 1931 and the order of this Court dated June 23, 1931, extending the term of this Court for the purpose of filing the defendant's bill of exceptions, to July 14, 1931, and the consent upon which that order was made; and the order of this Court, dated July 10, 1931, extending the term of this Court to August 15, 1931 for the purpose of filing the defendant's bill of exceptions and the affidavit of Leon E. Spencer, Assistant United States Attorney, dated July 10, 1931, upon which said order was based; and the notice of motion dated July 15, 1931 seeking the vacation of the order of this Court dated July 10, 1931; and the affidavit of Herbert A. Mossler verified the 15th day of July, 1931 in

support of said notice of motion and the affidavit of Leon E. Spencer, Assistant United States Attorney in opposition to said motion; and the order of this Court dated July 24, 1931, denying the plaintiff's motion to vacate the aforesaid order dated July 10, 1931; and the order of this Court dated August 14, 1931, extending the March, 1931 Term of this Court for the purpose of filing defendant's bill of exceptions to September 15, 1931 and the affidavit of Leon E. Spencer, Assistant United States Attorney, verified the 12th day of August, 1931 in support of said order of this Court dated August 14, 1931; and the notice of motion dated August [fol. 180] 21, 1931 seeking the vacation of the order of this Court dated August 14, 1931 and the affidavit of Herbert A. Mossler in support of said notice of motion, and the affidavit of Leon E. Spencer, Assistant United States Attorney in opposition to the plaintiff's motion to vacate the order of this Court dated August 14, 1931,

Now, on motion of George Z. Medalie, United States Attorney for the Southern District of New York, attorney for defendant, it is hereby

Ordered that the aforesaid motion brought to vacate the order of this Court dated August 14, 1931 be, and the same hereby is in all respects denied.

J. W. Mack, U. S. C. J.

[fol. 181] In United States District Court

[Title omitted]

Petition and Order Allowing Appeal

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Frank C. Bowers, as Executor of the Last Will and Testament of Frank K. Bowers as Collector of Internal Revenue of the United States for the Second District of New York, the above named defendant, feeling himself aggrieved by a judgment made and entered herein on the 26th day of March, 1931, in the sum of $56,841.32, together with interest and costs, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors

which is filed herewith, and prays for an order allowing [fol. 182] him to prosecute said appeal and that a transcript of record, papers and proceedings upon which the said order was made, may be duly authenticated and sent to the Circuit Court of Appeals for the Second Circuit and that a citation be issued, as provided by law.

Dated New York, June 15, 1931.

George Z. Medalie, United States Attorney for the Southern District of New York, Attorney for Defendant. Office and Post Office address: U. S. Courts and P. O. Bldg., Borough of Manhattan, City of New York.

It is ordered that the appeal, as above prayed for, be allowed.

Dated New York, N. Y., June 15, 1931.

Alfred C. Coxe, U. S. D. J.

[fol. 183] In United States District Court

[Title omitted]

Assignment of Errors

The defendant, Frank C. Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York, for his assignment of errors respectfully alleges that:

1. The District Court erred in denying the defendant's motion for a direction of a verdict in his favor, dismissing the amended complaint on the merits.

2. The District Court erred in granting the plaintiffs' motion for the direction of a verdict in their favor in the sum of $56,841.32, with interest from September 10, 1928.

[fol. 184] 3. The District Court erred in holding that the plaintiffs for the calendar year 1925 had no net taxable income.

4. The District Court erred in holding that the plaintiff, Hubert Dalton, sustained a loss in the sum of $395,000,

during the calendar year 1925, on the surrender of his shares of stock in the Dalton Manufacturing Corporation.

5. The District Court erred in holding that the plaintiff, Hubert Dalton, sustained a loss in the sum of $395,000, during the calendar year 1924 as a consequence of his ownership of stock in the Dalton Manufacturing Company.

6. The District Court erred in holding that the plaintiff, Hubert Dalton, sustained during the calendar year 1924, a "net loss" within the meaning of Section 206 of the Revenue Act of 1924, as a consequence of his ownership of capital stock of the Dalton Manufacturing Company.

7. The District Court erred in holding that the plaintiff, Hubert Dalton, during the calendar year 1924 sustained a loss attributable to the operation of a trade or business regularly carried on by the plaintiff during the calendar year 1924.

8. The District Court erred in not holding that the loss sustained by the plaintiff, Hubert Dalton, as a consequence of his ownership of the capital stock of the Dalton Manufacturing Company was an investment loss.

9. The District Court erred in holding that the loss accruing to the plaintiff, Hubert Dalton, as a result of his [fol. 185] ownership of the capital stock of the Dalton Manufacturing Company was sustained subsequent to December 31, 1922.

10. The District Court erred in failing to hold the particular year in which the plaintiff, Hubert Dalton, sustained the loss on the capital stock of the Dalton Manufacturing Company.

Wherefore the defendant prays that the judgment of the District Court of the United States be reversed.

Dated New York, N. Y., June 15, 1931.

George Z. Medalie, United States Attorney, Attorney for Defendant. Office and Post Office address: U. S. Courts and P. O. Bldg., Borough of Manhattan, City of New York.

[fol. 186] Citation, in usual form, omitted in printing.

[fol. 187] In United States District Court

[Title omitted]

Stipulation on Appeal Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated September 29, 1931.

Arnold Lichtig and Herbert A. Mossler, Attorneys for Plaintiffs. George Z. Medalie, United States Attorney, for defendant.

[fol. 188] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 189] In United States Circuit Court of Appeals for the Second Circuit

Hubert Dalton and Florence W. Dalton, Plaintiffs-Appellees,

against

Frank C. Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York, Defendant-Appellant

Before Manton, A. N. Hand, and Swan, Circuit Judges

Appeal from the District Court for the Southern District of New York. Suit to recover income taxes for 1925 paid under protest. Judgment for plaintiffs; defendant appeals. Reversed.

George Z. Medalie, Esq., United States Attorney. Leon E. Spencer, Esq., Asst. U. S. Attorney, of Counsel.

Arnold Lichtig and Herbert A. Mossler, Esqs., Attorneys for Appellees.

Opinion

Manton, Circuit Judge:

The appellee, Hubert Dalton, is an inventor and engineer. In 1917, he organized the Dalton Manufacturing

Company, a New York Corporation, of which he became the president, treasurer and a director. He owned all the capital stock, which cost him $395,000, and made unsuccessful efforts to sell the stock to the public. He devoted his time to inventing, and used the Dalton Manufacturing [fol. 190] Company to manufacture and market articles of his invention. He was in active charge of the company and its affairs, and from its incorporation until September, 1924, spent the greater part of his time at its office, receiving no compensation for his labors, although he was credited with a salary from 1917 to 1922 inclusive. The company at no time was profitable and appellee loaned to it from 1920 to 1924 aproximately half a million dollars for which it was indebted to him at the time of its dissolution. It manufactured articles of his invention only, but sold some small tools incidental to the articles manufactured. In 1924, it became badly involved financially, owing considerable money. In 1923, in his income tax return, appellee claimed a deduction for bad debts of $157,035.50, owed him by the corporation, claiming that it was unable to meet its obligations and pay its debts to him. In December, 1923 the liabilities exceeded the assets by $173,462, and in that year it ceased operations and took steps to wind up its business. Its assets were disposed of during 1924. The profits of the sale were insufficient to pay its creditors. However, the appellee advanced sufficient funds to the corporation for that purpose. It was not actually dissolved until 1925, when appellee surrendered his stock for cancellation.

In his return for 1925 he claimed a deduction for the loss sustained in his investment of $395,000 paid for the stock of the corporation, pursuant to § 206, subdivisions (a) and (b) of the Revenue Act of 1924 (43 Stat. 260). Under sub- [fol. 191] division (a) the "net loss" means the excess of the deductions allowed by § 214 or § 234 over the gross income, with the following exceptions and limitations:

"(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business."

Subdivision (b) provides:

"If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any tax-

payer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the next income of the taxpayer for the succeeding taxable year (hereinafter in this section called 'second year'), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year'); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

Regulation 65, Art. 1621, provides that the net loss may include therein "losses from the sale or other disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business. * * * In order to be entitled to claim an allowance for a 'net loss' the taxpayer must have suffered an actual net loss in a trade or business during the taxable year."

[fol. 192] The questions presented here are (a) when was the loss sustained and (b) if in 1924, was it in a business or trade regularly carried on by the appellee.

There is no justification for saying that the business of the corporation was that of the appellee. During the period the appellee dealt with the corporation as an entity. When he paid the debts of the corporation, he drew on his personal account in favor of the corporation's account and this made the corporation his debtor. Separate tax returns were filed by the corporation and by the appellee. He purchased the capital stock with the intention of disposing of it to the public. His individual time was spent in large part in matters of invention. In his return for 1923, he stated that the corporation ceased operations and took steps to wind up its business; that he advised the trade that no further orders would be accepted and the plant would remain closed. The loss now sought to be deducted was an investment which he made in the corporation and did not occur in the operation of the trade or business regularly carried on by the appellee. Mente v. Eisner, 266 Fed. 161 (C. C. A. 2); Bedell v. Commr., 30 Fed. (2) 622 (C. C. A. 2); Goldberg v. Commr., 36 Fed. (2) 551 (Ct. App. D. C.); Phipps v. Commr., C. C. A. 2, Dec. 7, 1931; Anderson v. U. S., 48 Fed. (2) 201 (C. C. A. 5).

By the statute, allowing the deductions and carrying over the loss for two years, Congress intended to give relief to persons engaged in an established business for losses incurred during a year of depression in order to equalize taxation in the two succeeding and more profitable years. It was not intended to apply to occasional or isolated losses. [fol. 193] Congress had made this distinction. Anderson v. U. S., 48 Fed. (2) 201 (C. C. A. 5); Pabst v. Lucas, 36 Fed. (2) 614 (Ct. App. D. C.); DeHaven Mfg. Co. v. U. S., 31 Fed. (2) 999. In Nixon v. Lucas (42 Fed. [2] 833), this court considered a case where three petitioners owned all the stock of a corporation and made a practice of selling in the corporate name. Business was unsuccessful and the petitioners made loans to the corporation, agreeing to take in return the profits. The company sustained large losses and the petitioners divided these among themselves and claimed a deduction in their income tax returns. We said that the parties chose to deal with the corporation as a legal person, which they could do if they so desired; that the agreements created contracts with the same obligations as though the corporation had been an individual and the fact that the partners could at any time take over the assets and deal directly with their customers was not a reason for looking behind the pattern so devised and used; we said further that the losses of the corporation in the particular year were not the losses of the stockholders.

This taxpayer did not regard the business losses of the Dalton Manufacturing Company as his loss. The loss sustained by the appellee which he seeks to charge off is a capital investment loss. The rule is well settled that the corporation will be looked upon as a legal entity. Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S., 267; Klein v. Bd. of Tax Supervisors, 282 U. S. 19. It is only where the legal entity is used to defeat public convenience, protect fraud or defend crime, that the entity will be disregarded [fol. 194] and the corporation be said to be an association of persons. U. S. v. Milwaukee Refrigerator Co., 142 Fed. 247; Majestic Co. v. Orpheum Circuit, 21 Fed. (2) 720 (C. C. A. 8); Boatright v. Steinite Radio Corp., 46 Fed. (2) 385 (C. C. A. 10).

Appellee relies principally upon the authority of Washburn v. Commissioner (51 Fed. [2] 949, C. C. A. 8), where it appeared that a lawyer gave up his practice and devoted

all his time to the management of various corporate enterprises which he had formed in his practice and in which he was financially interested. Four of these corporations were timber holding companies which he alone managed. To open up more timber lands, he organized a railroad, advanced the money to build it and took back most of the stock. In 1922, he sold the stock, sustaining a heavy loss, and sought to deduct it in his 1923 return. He was allowed such deduction, as it was found that his occupation and avocation was the management of his own interests. The court said:

"A party may have interests in corporate stocks, have no particular occupation, and live on the return of his investments. That would not constitute business under the statute in question [§ 204, Rev. Act 1921, now § 206, Rev. Act 1924]. He may, however, taken such an active part in the management of the enterprise in which he has investments as to amount to the carrying on of a business."

The building of the railroad was not an isolated transaction. It was constructed as an aid to the timber companies and was part of the general enterprise—"it was merely the *alter ego* of the petitioner". He maintained a completely organized office and gave his personal attention to the management of the various companies, receiving no [fols. 195 & 195½] salary except such as to cover the actual expenses involved. His income was the result not alone of his investments, but also of the labor expended by him in the development of the companies. The combination of the two constituted his avocation. These facts, perhaps, distinguished the case from the instant one. At bar, it is clear no business is shown except that conducted by the Dalton Manufacturing Company. The taxpayer had an independent business, to wit, inventing. It must be borne in mind that the appellee here advanced $395,000, not to his own business, but to be applied to the purchase of stock in the corporation and he chose to deal with the public through the corporation. The loss he thus sustained was not a loss incurred in the regular occupation of a trade or business.

Moreover, it appears that the loss which the appellee now seeks to deduct was incurred when the stock proved worthless. This did not occur in 1925 when the corpora-

tion was dissolved. There was a net deficit at the end of 1924 of $714,344. All of the assets had been sold in that year. Appellee had ascertained the stock to be worthless prior to the end of 1924, and if any deduction was permissible, it should have been made in 1924. The Commissioner therefore was correct in holding that the stock was not ascertained to be worthless in 1925. Darling v. Commr., 49 Fed. (2) 111 (C. C. A. 4); Deeds v. Commr., 47 Fed. (2) 695 (C. C. A. 6); DeLoss v. Commr., 28 Fed. (2) 803 (C. C. A. 2); Royal Packing Co. v. Commr., 22 Fed. (2) 536 (C. C. A. 9).

Judgment reversed.

[fol. 196] In United States Circuit Court of Appeals, Second Circuit

Hubert Dalton and Florence W. Dalton, Plaintiffs-Appellees,

vs.

Frank C. Bowers, as Executor, etc., Defendant-Appellant

Judgment—Filed Feb. 23, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, reversed, with costs. Further ordered that execution issue for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 197] [File endorsement omitted.]

[fols. 198-205] Petition for rehearing, covering eight pages, filed February 29, 1932, omitted from this print. It was denied and nothing more by order of March 14, 1932.

[fol. 206] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Order Denying Rehearing—Filed March 14, 1932

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 207] [File endorsement omitted.]

[fol. 208] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 209] Supreme Court of the United States

Order Allowing Certiorari—Filed May 31, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,725. U. S. Circuit Court of Apeals, Second Circuit. Term No. 52. Hubert Dalton and Florence W. Dalton, petitioners, vs. Frank C. Bowers, as executor of the last will and testament of Frank K. Bowers, etc. Petition for a writ of certiorari and exhibit thereto. Filed May 2, 1932. File No. 36,725.

FILE COPY

MAY 2

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted]-52

HUBERT DALTON and FLORENCE W. DALTON,
Petitioners,

against

FRANK C. BOWERS, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ARNOLD LICHTIG,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1931.

No. --------

HUBERT DALTON and FLORENCE W. DALTON,
Petitioners,

against

FRANK C. BOWERS, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THIS HONORABLE COURT:

The petition of Hubert Dalton and Florence W. Dalton respectfully shows:

(A)

Summary Statement of the Matter Involved.

The Circuit Court of Appeals for the Second Circuit on February 23, 1932 has reversed a judgment of the United States District Court for the Southern District of New York entered March 26, 1931 for $56,841.32, being the amount paid under protest for additional income taxes assessed by the Commissioner of Internal Revenue for 1924

and 1925, resulting from the Commissioner's refusal to carry forward to 1925, a conceded 1924 loss of $374,078.98 on the sole ground that such loss was not sustained in a business regularly carried on by the taxpayer.

The precise question here involved has also arisen in the Eighth Circuit where the Circuit Court of Appeals sustained petitioner's contention.

The decisions in the two circuits are in flat contradiction to each other.

The facts, which are undisputed, are summarized as follows:

Hubert Dalton, one of the petitioners, since 1914 and including 1924-1925 (the years here involved has continuously been engaged in business, regularly carried on by him, as inventor, designer of patents, promoter and exploiter of such patents, and the manufacture and marketing, through corporations organized by him especially therefor, of such patented articles (R. 23, 24, 35). To these corporations he transferred some of his Letters Patent, which included over a thousand of his ideas, and thus far he has organized and controlled six of such corporations (R. 29, 32-36, 45).

He maintained at his own personal expense two separate and completely equipped workshops, one at his home in Connecticut and one at his office in New York City. These workshops, and his office had no connection with his corporations (R. 30, 31).

He gave his personal attention to the management of the various companies which he organized for the exploitation of his patents, received no salary, although some was credited to him on the books for a time (R. 43, 53). He hoped to profit as a result, not alone by employing his cap-

ital, but also by the labor expended by him in development of his companies, by the use of which he hoped to so popularize his inventions that he might dispose of his patent rights. His opportunity of profit, and his risk of loss, depended upon the proceeds of the sale of his stock in the corporation, and he endeavored, unsuccessfully, to dispose of such stock from time to time (R. 55). Petitioner had no other business. The profit on the sale of the patents, through the sale of the stock in such corporations, or the loss on such sale, was the profit or loss resulting to the petitioner in his business which he regularly carried on for so many years and in which he was daily engaged.

One of the corporations so utilized by the petitioner in his personal business was the Dalton Manufacturing Corporation which he organized, controlled, managed and directed, acquiring all the capital stock of said corporation at a cost of $395,000 (R. 5, 27). The venture was unsuccessful. Petitioner was unable to dispose of the stock in the Dalton Manufacturing Corporation, and the $395,000 capital employed by petitioner in such venture became a loss in 1924, when the Commissioner ascertained the stock to be worthless. Of this conceded loss petitioners sought to carry over $374,078.98 to 1925 as a "net loss", but the Commissioner disallowed such deduction.

An additional tax of $56,841.32 was assessed for the year 1925 and paid under protest, and this suit was then instituted for its return. The District Court sustained petitioners' contention and awarded judgment in their favor, but such judgment was reversed by the Circuit Court of Appeals.

In so reversing, the Circuit Court of Appeals held that Hubert Dalton was not engaged in the type of business in which a "net loss" might be sustained saying that "Con-

gress intended to give relief to persons engaged in an established business for losses incurred during a year of depression in order to equalize taxes in the two succeeding and more profitable years".

Such decision is directly contrary to that in *Washburn* v. *Commissioner*, 51 Fed. (2d) 949 where the Circuit Court of Appeals for the Eighth Circuit under similar (and legally indistinguishable) facts held that a "net loss" was sustained in a similar type of business and permitted a taxpayer to deduct the cost price of corporate stock as a "net loss" where the taxpayer controlled and operated the corporation and utilized it in connection with his personal business (just as petitioner, Hubert Dalton, controlled and utilized the Dalton Manufacturing Corporation).

The question involved was squarely presented and determined by the Eighth Circuit and the Court there, in a comprehensive and learned opinion, reached a conclusion contrary to that reached by the Second Circuit in this case. It is to review this decision that the present application for certiorari is made.

(B)

Reasons Relied on for Allowance of Writ.

1. The decision of the court below erroneously construes section 206 (a) and (b) of the Revenue Act of 1924, and Article 1621 of Treasury Department Regulations 65, in holding that a loss sustained by an individual engaged in a personal business, regularly carried on by him in connection with the acquisition of stock in a corporation organized, managed and controlled by him and utilized in furtherance of his personal business as a branch, arm, and instrumentality thereof, may not be carried forward as a

"net loss" and deducted in the following year. The text of the statute and regulations is set forth in petitioners' brief in this application, presented herewith.

2. The decision of the court below is in irreconcilable conflict with that of the Circuit Court of Appeals, Eighth Circuit, in *Washburn* v. *Commissioner,* involving the identical principles and decided upon a state of facts practically identical with that in the case at bar, where a directly contrary conclusion was reached. No certiorari to review that decision was applied for and the time for same has expired.

3. The Board of Tax Appeals, both prior to and since the decision in *Washburn* v. *Commissioner,* adopted and followed the rule and principle approved by that decision, but can no longer do so, and if the rule adopted in the Second Circuit is to be taken as authoritative, confusion will necessarily result. Until the conflicting decision in the case at bar, the ruling in *Washburn* v. *Commissioner* stood as the controlling judicial interpretation of the law on this subject.

4. Notwithstanding the merits of petitioners' contention, the question should not be left in its present state of hopeless confusion. Only by granting a writ of certiorari and an authoritative holding by this Court, can the confusion and conflict of authorities be remedied.

Wherefore your petitioners respectfully pray that a writ of certiorari out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second District, commanding that Court to certify and to send to this Court for its review and

determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 11,685, Hubert Dalton and Florence W. Dalton *v.* Frank C. Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of United States for the Second District of New York, and that the decree of said Court may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

April, 1932.

HUBERT DALTON and FLORENCE W. DALTON,

By: ARNOLD LICHTIG,

Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

HUBERT DALTON and FLORENCE W. DALTON,
Petitioners,

against

FRANK C. BOWERS, as Executor of the Last Will and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States for the Second District of New York,
Respondent.

BRIEF FOR PETITIONERS ON APPLICATION FOR WRIT OF CERTIORARI.

This application is for certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit entered February 23, 1932, reversing the United States District Court for the Southern District of New York, which had awarded petitioners a judgment in the sum of $56,841.32 and interest for the return of income taxes claimed to have been illegally collected for the year 1925.

The opinion below is reported in 56 Fed. (2) 16.

Jurisdiction.

Jurisdiction to review is conferred by Section 347 of the Judicial Code providing that in any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court, upon the petition of any party thereon, to require by certiorari that the cause be certified

to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought either by unrestricted writ of error or appeal. The decree below was entered February 23, 1932 (R. 194) and this application is made within the three months period prescribed by Section 350 of the Judicial Code.

The present case is one specified in Rule 38, par. 5, Subd. (b) of this Court "where a Circuit Court of Appeals

> (1) has rendered a decision in conflict with a decision with another Circuit Court of Appeals on the same matter,
>
> (2) has decided an important question of general law in a way probably untenable in conflict with the weight of authority,
>
> (3) has decided an important question of Federal law which has not been, but should be, settled by this court."

Statement of Case.

A complete statement of the facts, with reference to the record, appears in the petition presented herewith under subdivision (A) entitled "Summary Statement of the Matter Involved" (pages 1 to 4 of petition).

Statutes Involved.

The pertinent provisions of the Revenue Act of 1924 are as follows:

> Sec. 206 (a) "As used in this section, the term 'net loss' means the excess of the deductions allowed by Section 214 or 234 over the gross income, with the following exceptions and limitations:

(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business; * * *

(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called 'second year') and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called the 'third year'); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

The pertinent provisions of Treasury Department Regulation 65 are as follows:

Art. 1621. *"Net losses, definition and computation.* The term 'net loss' as used in the Statute applies to a net loss during the taxable year in a trade or business regularly carried on by the taxpayer. Included therein are losses from the sale or other disposition of real estate, machinery and other capital assets used in the conduct of such trade or business. In order to be entitled to claim an allowance for a 'net loss' the taxpayer must have suffered an actual net loss in a trade or business during the taxable year."

Conflict of Decisions in the Circuit Court of Appeals.

In *Washburn* v. *Commissioner,* 51 Fed. (2d) 949 (*decided August 11, 1931*) the Circuit Court of Appeals for the Eighth Circuit, held that a "net loss" was sustained and was properly carried over to a succeeding year, where an individual taxpayer sustained a loss in the capital stock of a corporation, which he organized and used as a part of his personal business. The loss was an "isolated loss", no similar one being incurred. Nevertheless, it was held that it was incurred in a general business regularly carried on and constituted a "net loss".

The Circuit Court of Appeals in the Second Circuit in the instant case (*decided February 15, 1932*) held the exact opposite; namely, that a "net loss" was not sustained and could not be carried over to a succeeding year where an individual taxpayer sustained a loss on the capital stock of a corporation which he organized and used as part of his personal business. The loss was an "isolated loss", no similar one being incurred. For that reason, it was held that it could not have been incurred in an established business regularly carried on and could not constitute a "net loss".

The two decisions are in irreconcilable conflict with each other. The two cases are not legally distinguishable on their facts, although the businesses of the taxpayers involved were somewhat different.

The court below, in its opinion stated the facts in *Washburn* v. *Commissioner* and said

> "These facts, perhaps, distinguished the case from the instant one."

The use of the word "perhaps" indicates that the distinction is more imaginary than real.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the loss was not a "net loss" within the meaning of section 206 (a) and (b) of the Revenue Act of 1924 and Treasury Department Regulations 65, Article 1621.

2. The Circuit Court of Appeals erred in holding that the loss was not sustained by the taxpayer in a trade or business regularly carried on by him during the taxable year.

3. The Circuit Court of Appeals erred in refusing to carry over to the year 1925, and in refusing to deduct from the gross income for that year, the "net loss" sustained by the taxpayers for the year 1924.

4. The Circuit Court of Appeals erred in reversing the judgment of the United States District Court for the Southern District of New York.

Summary of Argument.

The petitioner Hubert Dalton was engaged in a personal business regularly carried on by him from 1914 to date, and he was regularly engaged in that business, and none other, during the year 1924 when the loss was sustained.

Congress has not distinguished between different classes or types of business, and the Revenue Act applies with equal force to *any* trade or business so long as it is regularly carried on by the taxpayer.

There is a distinction between an "isolated transaction" and an "isolated loss". An "isolated transaction" does not constitute a "business regularly carried on", whereas an "isolated loss" is a single or infrequent loss sustained in a "business regularly carried on".

The taxpayer being engaged in a business regularly carried on by him since 1914 and having utilized the Dalton Manufacturing Corporation (as he did others) in furtherance of his own business and as an instrumentality thereof, the loss sustained in connection with the stock of that Corporation was a loss in the personal business of the taxpayer.

Being a loss sustained in taxpayers' personal business, regularly carried on by him in the taxable year, the same constituted a "net loss" and may be carried over as a deduction for the following taxable year.

The decision below is in flat contradiction to the correct rule as declared and applied in the Eighth Circuit.

ARGUMENT.

In *Washburn* v. *Commissioner*, 51 Fed. (2) 949, KENYON, Circuit Judge, writing for the unanimous court, stated the point involved to be (page 951):

> "Was the petitioner regularly operating a trade or business?"

and in permitting an "isolated loss" in corporate stock to be carried over and deducted as a "net loss", said:

> "to avail himself of the deduction provided by section 204 (a) of the Revenue Act of 1921, *supra*, petitioner must show that the loss resulted from the operation of some trade or business regularly carried on by him."

When the same question arose in the case at bar, MANTON, Circuit Judge, held squarely to the contrary, finding a different intention in the Statute, and said (R. 191):

> "By the statute, allowing the deductions and carrying over the loss for two years, Congress intended to

give relief to persons engaged in an established business for losses incurred during a year of depression in order to equalize taxation in the two succeeding and more profitable years."

The same contention, as to the intent of the Statute, was made in the *Washburn* case, but overruled as follows (page 952):

> "Respondent contends that petitioner was a mere investor; that the statute is restricted in its application to taxpayers whose income is derived from regular trade with others, such as merchants, manufacturers, and those who have paid taxes on incomes reflected by inventories."

The Eighth Circuit then discussed the meaning of the word "business" as used in the statute and after considering several decisions of this Court, and supporting these petitioners' contention, said (page 953):

> "the statute does not provide that to secure the benefits the taxpayer must be engaged in only one business. It is to *any* 'trade or business'. A party may be engaged in many kinds of business and still be entitled to the benefit of the statute."

Thus the decisions of the Eighth Circuit and Second Circuit are in direct conflict concerning the intention of Congress and the meaning of the word "business" as employed in the Revenue Acts with respect to a "net loss".

At bar, the court below, referring to the statute, also said (R. 191):

> "It was not intended to apply to occasional or isolated losses. Congress has made this distinction."

By that statement the Court failed to distinguish between "isolated *losses*" and "isolated *transactions*".

In the *Washburn* case the Court said (page 953):

> "An isolated transaction in itself would not be a business regularly carried on, but it could well be part of a general business."

The taxpayers' loss on the sale of the stock in the railroad corporation was an "isolated loss", and when the Court permitted its deduction as a "net loss", it necessarily held that Congress did not make the distinction as stated in the opinion in the instant case.

The learned court below said, in effect, that the corporate entity of the Dalton Manufacturing Company cannot be disregarded for the purpose of crediting petitioners with this loss. However, petitioners do not seek credit for any corporate loss. It was their own individual loss of what was paid for the stock in this corporation which they desire to deduct, similar to the loss deducted in the *Washburn* case, where the court, quoting in part from a decision of the Board of Tax Appeals, said (page 955):

> "'* * * upon the sale of stocks or bonds or failure or liquidation of the corporation, the stockholders or bondholders may sustain an operating loss, which is different from the operating loss of the corporation * * * 'It is obvious that an individual may suffer a 'net loss' within the meaning of the Statute upon the failure of a corporation or a sale or other disposition of his interest therein.'"

On the facts, the *Washburn* case and instant case are indistinguishable. In both cases the taxpayers employed corporations as instrumentalities of their personal businesses, in order to promote the general enterprise in which

each was engaged respectively. In the *Washburn* case the Court said (pages 953-954):

> "Much is said in argument as to petitioner being engaged solely in holding the securities of the enterprises in which he was interested, and that he was a mere investor receiving the ordinary returns of ownership. A party may have investments in corporate stock, have no particular occupation, and live on the return of his investments. That would not constitute business under the statute in question. *He may, however, take such an active part in the management of the enterprise in which he has investments as to amount to the carrying on of a business.*"
>
> * * * * * *
>
> "The business of petitioner was not merely looking after investments or reaping the return of past labor represented thereby. He had an office with a complete organization, and gave personal attention to, and participated in, the management of these various companies and enterprises in which he had the investments, not for the purpose of conserving them merely, but of carrying them on successfully and making them profitable. To this he gave his entire time, receiving no salary, except such as might cover his expenses. His work for these different enterprises was not merely sporadic, but was a continuous and regular carrying on. Petitioner testified he worked as hard at his new line of work as he did when he was practicing law. *His income was the result, not alone of his investments, but also of his labor expended in connection with the management of the companies in which he had such investments. The combination of the two is his vocation.*"

Such language applies with equal force to the business of the taxpayer at bar, who took such an active part in the

management of the enterprise in which he has investments as to amount to the carrying on of a business.

This taxpayer also had an office with a complete organization, gave personal attention to, and participated in, the management of these various companies and enterprises in which he had the investments, not for the purpose of conserving them merely, but of carrying them on successfully and making them profitable. To this Mr. Dalton gave his entire time, receiving no salary although some was credited to him on the books. "His work (like Mr. Washburn's) for these different enterprises was not merely sporadic but was a continuous and regular carrying on. He worked hard in his business and his (anticipated) income was the result not alone of his investments, but also of his labor expended in connection with the management of the companies in which he had such investments. The combination of the two is his vocation." There is no distinction in the two cases on the facts—the parallel is too complete.

The *Washburn* case, in construing the statute involved, reached a conclusion in accord with that previously reached and applied by the Board of Tax Appeals.

The recent cases decided by the Board of Tax Appeals (both before and after the *Washburn* case) uniformly held that a loss on stock of a corporation, utilized by the taxpayer as a part or instrumentality of his personal business, regularly carried on by him, is properly deductible as a "net loss".

Examples may be found in the following cases, all involving a single, non-recurring loss on corporate stock, and in all of which the construction contended for by the petitioners was adopted and followed:

Heaslet v. *Commissioner*, 23 B. T. A. 50;
Anthony v. *Commissioner*, 20 B. T. A. 5;

Averill v. *Commissioner*, 20 B. T. A. 1196;
Potter v. *Commissioner*, 18 B. T. A. 549.

The present conflict of decisions should be settled by an authoritative decision of this Court.

April, 1932.

ARNOLD LICHTIG,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932—No. 52

HUBERT DALTON and FLORENCE W. DALTON,
Petitioners-Appellants,

against

FRANK C. BOWERS, as Executor of the Last Will and Testament of FRANK K. BOWERS, as Collector of Internal Revenue of the United States, for the Second District of New York,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS

ARNOLD LICHTIG,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932—No. 52

HUBERT DALTON and FLORENCE W. DALTON,
Petitioners-Appellants,

against

FRANK C. BOWERS, as Executor of the Last Will and Testament of FRANK K. BOWERS, as Collector of Internal Revenue of the United States, for the Second District of New York,

Respondent-Appellee.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 130-135) is reported in 56 F. (2nd) 16. The opinion of the United States District Court for the Southern District of New York (R. 66-69) is unreported officially.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 23, 1932 (R. 135). Petition for rehearing was filed on February 29, 1932 and was denied on March 14, 1932 (R. 135-136). Petition for a Writ of Cer-

tiorari was filed on May 2, 1932, and granted on May 31, 1932 (R. 136). Jurisdiction is conferred upon this court by § 240-(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes and Regulations Involved.

The applicable statutes and regulations are contained in the Appendix, *infra*, pp. 21, 22.

Statement.

Petitioner Hubert K. Dalton had been an inventor and engineer for thirty-five years (R. 14). He belonged to the American Society of Mechanical Engineers and to the Automotive Engineers of America (R. 14). He had been connected with companies engaged in very substantial construction and machinery operations, including the General Motors Company, Flint Wagon Works, Western Mott Company, Whiting-Dalton Co. and had charge of the construction of the Buick, Oakland and Pontiac automobile plants (R. 16, 17).

His inventions included about one thousand ideas, and covered improvements in automobiles, lathes (R. 16), combination submarine machine tools (R. 22), smoking stand, curtain-holder, railroad signal (R. 24), lathe tools, lathe dogs, lathe chops, lathe collets (R. 37) and multiple drilling machine (R. 15) which were patented in this and many other countries, all at his own personal expense (R. 19).

Since 1914 he has been *continuously* engaged in business on his own account as inventor, designer of patents, patentee, promoter and exploiter of such patents, through the manufacturing and marketing by corporations organ-

ized by him specially therefor, of such patented articles (R. 17, 23, 25). At different times he organized and operated six of such corporations (R. 34). These companies developed only articles covered by his inventions (R. 18). Small incidental tools and attachments required with the articles invented by him were sold by his companies, but amounted to less than 1% of the business (R. 18).

Mr. Dalton was president and treasurer of each company. The other officers were his employees (R. 17, 49). He paid for and owned all of the capital stock of these companies and no one else had any financial interest therein (R. 18, 19).

He made frequent loans to his companies, but never charged or received interest therefor (R. 29). He frequently advanced weekly payrolls for his various companies (R. 28). He personally guaranteed the payment of his company's loans to banks (R. 29), endorsed notes of his companies, and on occasion pledged his personal securities as collateral for loans made to one of his companies, Dalton Manufacturing Corporation (R. 29). He personally guaranteed various purchases made by this company, running into very large amounts (R. 29). He frequently borrowed moneys from his own bank and loaned the proceeds to this company, upon which loans he personally paid interest to his bank, but charged none to his company (R. 30). He frequently paid the company's notes for moneys borrowed, when they matured, using his own funds for that purpose (R. 30). He even paid his own traveling expenses when selling the company's products (R. 32, 49).

He personally supervised, and managed and "was in charge of the affairs" of the business of these companies. The business of each company was different (R. 48). He

received no salary although some was credited to him on the books for a time (R. 32).

He worked hard, daily, nights, Sundays and holidays spending several hours a day, nights and holidays in his two workshops and office, which had no connection with his companies (R. 20, 21, 22) and in addition he devoted from five to ten hours daily directing the affairs of his companies (R. 39). Aside from his personal business, of which his companies were a part, he had no other business (R. 24, 33).

He hoped to profit as a result not alone of employing his capital, but also by his labor in developing his companies, thereby popularizing and enhancing the value of his inventions and enabling him to profitably dispose of his patents and his stock interests therein (R. 20, 23). His opportunity for profit and his risk of loss, depended upon the proceeds of the sale of his stock in these companies, which he unsuccessfully endeavored to accomplish from time to time (R. 26, 40).

He maintained at his own personal expense an office in New York City (R. 22), two separate and completely equipped workshops, one at his home in Connecticut and one at his office in New York City (R. 20, 21).

Mr. Dalton made no distinction between himself and his companies, treating the companies as his *alter ego* and as an adjunct to and integral part or branch of his own business (R. 24)—"as a means to an end" (R. 24).

One of the companies so utilized by the petitioner in his personal business was the Dalton Manufacturing Corporation which he organized, controlled, managed and directed, acquiring all the capital stock of said corporation, at a cost of $395,000 (R. 41) The venture was unsuccessful. Petitioner was unable to dispose of the stock

in this Company, and in the year 1924 the $395,000 capital employed by him in such venture became a loss. Of this conceded loss, petitioners sought to carry over $374,078.98 to 1925 as a "net loss", but the Commissioner disallowed such deduction, resulting in the $56,841.32 tax which petitioners paid, under protest, and to recover which they brought this action. In the District Court, they recovered judgment (R. 11), but this was reversed on appeal (R. 135), which reversal is here sought to be reviewed (R. 136).

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the loss was not a "net loss" within the meaning of Sections 206 (a) and (b) of the Revenue Act of 1924 and Treasury Department Regulations 65, Article 1621.

2. The Circuit Court of Appeals erred in holding that the loss was not sustained by the petitioner, Hubert Dalton, in a trade or business regularly carried on by him during the taxable year.

3. The Circuit Court of Appeals erred in refusing to carry over to the year 1925, and in refusing to deduct from the gross income for that year, the "net loss" sustained by said petitioner for the year 1924.

4. The Circuit Court of Appeals erred in reversing the judgment of the United States District Court for the Southern District of New York.

Summary of Argument.

The petitioner, Hubert Dalton, was engaged in a personal business regularly carried on by him from 1914 to date, and he was regularly engaged in that business, and none other, during the year 1924 when the loss was sustained.

Congress has not distinguished between different classes or types of business, and the Revenue Act applies with equal force to *any* trade or business so long as it is regularly carried on by the taxpayer.

There is a distinction between an "isolated transaction" and an "isolated loss". An "isolated transaction" does not constitute a "business regularly carried on", whereas an "isolated loss" is a single or infrequent loss sustained in a "business regularly carried on".

The taxpayer being engaged in a business regularly carried on by him since 1914 and having utilized the Dalton Manufacturing Corporation (as he did others) in furtherance of his own business and as an instrumentality thereof, the loss sustained in connection with the stock of that corporation was a loss in the personal business of the taxpayer, regularly carried on by him in the taxable year, and constituted a "net loss" which may be carried over as a deduction for the following taxable year.

The corporate entity of the Dalton Manufacturing Corporation has not been, and is not to be, disregarded. That entity, taken as a whole, was an instrument used by Dalton in furtherance of his own personal business. The $395,000 he paid for the stock of that company was an investment of capital in that personal business. He sought to deduct, not the loss sustained by the company, but his own personal loss.

ARGUMENT.

The petitioners' $395,000 conceded loss was sustained in 1924 "in a trade or business regularly carried on" by him, and the unused excess of $374,078.98 was therefore deductible from the 1925 Income Tax Return under the Revenue Act of 1924, Sec. 206, and Treasury Reg. 65, Art. 1621.

The District Court found as a fact that this "loss was incurred in a trade or business regularly carried on by the taxpayer in 1924" (R. 68). The Circuit Court of Appeals, though reversing the District Court, also found that "the taxpayer had an independent business, to wit, inventor" (R. 134) and "used the Dalton Manufacturing Company to manufacture and market articles of his invention" (R. 130).

The $395,000 loss here involved was what the taxpayer paid for the stock he acquired in the Dalton Manufacturing Corporation. The Circuit Court of Appeals decided, however, that this was not a loss in his trade or business, that it was merely the result of an investment which he made in the corporation, that there is no justification for saying that the business of the corporation was his, and that Congress by the statute did not intend the deductions to apply to occasional or isolated losses but only to an "*established* business for losses incurred in a year of depression in order to equalize taxation in the two succeeding and more profitable years."

The Revenue Act does not limit the kind or character of the trade or business in which the deduction is permitted, beyond requiring it to be "*a* trade or business regularly carried on."

The phrase "a trade or business", used in the Act, means "*any* trade or business" as the Revenue Act of 1921 specifically stated.

"Trade" has been defined in *Bouvier's Law Dictionary* as follows:

> "* * * in its broader sense it is generally construed as equivalent to any occupation, employment, handicraft, or business:"

"Business" was defined by this court in *Flint* v. *Stone Tracey Co.*, 220 U. S. 107, 171, as follows:

> " 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People *v.* Tax Comrs., 23 N. Y. 242, 244. That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. *Bouvier's Law Dict.*, Vol. I, p. 273."

In *Baker* v. *Comm.*, 17 B. T. A. 733, 737, the Board of Tax Appeals declared:

> "In order to constitute a 'net loss' within the meaning of the statute, it is not necessary that the taxpayer should sustain the loss in his principal business or vocation. The word 'business' is qualified by the word 'any'. The taxpayer is entitled to this benefit where the loss is incurred in 'any trade or business regularly carried on' by him. Oscar K. Eysenbach, 10 B. T. A. 716" (also citing Von Baumback *v.* Sargent Land Co., 242 U. S. 503; Edwards *v.* Chile Copper Co., 270 U. S. 452).

In *Bryan* v. *Comm.*, 21 B. T. A. 364, 369, it was again declared:

> "The Board has frequently held that the phrase

> 'trade or business regularly carried on' does not limit net loss deductions to losses sustained in a taxpayer's sole or principal trade or business. The test is the 'regularity' with which a trade or business is carried on. See Harry F. Harper, 20 B. T. A. 143, 153, and cases there cited."

The Circuit Court of Appeals said that "the taxpayer had an independent business, to wit, inventing" (R. 134). But his business did not stop there. The Solicitor-General in his Memorandum on the Petition to this Court for Writ of Certiorari, at page 3, agrees that:

> "In organizing the Dalton Manufacturing Corporation it was Dalton's purpose to have the corporation take over, develop, manufacture, and sell the articles invented by him with a view to making his patented articles well known to the public and the corporate stock held by him more valuable."

In other words, the taxpayer's trade or business was not merely that of inventing—it included the exploiting of those inventions and putting them on a paying basis, by developing, manufacturing, improving and selling the patented articles, putting them on the market. That all formed a complete, comprehensive enterprise in which the Dalton Manufacturing Company formed only a part, a subsidiary, a means to an end—a branch of the entire business (R. 24). The different branches of this business are all interlocked, interrelated, each dependent on the other, so that, as the District Judge said in this case (R. 68):

> "I cannot help but feel, from listening to the testimony, that the Dalton Manufacturing Corporation was in a sense his *alter ego* to the extent that it was employed by the individual taxpayer * * *".

That the petitioner "regularly carried on" his business cannot be questioned. He devoted all his time to it. He has never been in any other business. It has been continuous with him (R. 24).

The authorities consistently support petitioner's position.

In *Washburn* v. *Commissioner*, 51 Fed. (2d) 949 (C. C. A. 8), it appeared that a lawyer gave up his practice and devoted all his time to the management of various corporate enterprises which he had formed in his practice and in which he was financially interested. Four of these corporations were timber holding companies which he alone managed. To open up more timber lands, he organized a railroad company, became its principal stockholder and managed its affairs. In 1922, he sold the stock, sustaining a heavy loss, and sought to deduct it as a "net loss" in his 1923 tax return. The Circuit Court of Appeals held that the railroad company was not a separate and distinct enterprise but was organized and the railroad constructed as an aid to the taxpayer's timber companies and as part of the general enterprise and "was merely the *alter ego* of the petitioner". The court then concluded that the loss sustained by the petitioner from the sale of his railroad company stock resulted from the operation of a "trade or business regularly carried on by the taxpayer".

Commenting on the *Washburn* case, the Circuit Court of Appeals in this case observed that (R. 134):

> "His (Washburn's) income was the result not alone of his investments, but also of the labor expended by him in the development of the companies. The combination of the two constituted his avocation."

The Court then continued:

> "These facts, *perhaps*, distinguished the case from the instant one."

All of the features of the *Washburn* case are here present and no distinction is possible. This is recognized by the Solicitor-General in his Memorandum on the petition for the Writ of Certiorari in this case, as follows:

> "While the court below thought that the *Washburn* case was 'perhaps' distinguishable (R. 193) it seems reasonably clear that there is no such fundamental difference in the facts of the two cases as to justify a different result if the same rule were applied to both."

Clark v. *Burnet*, 59 Fed. (2nd) 1031, was decided by the Court of Appeals of the District of Columbia on April 11, 1932 after the decision by the Circuit Court of Appeals in the case at bar. The opinion in the *Clark* case describes the taxpayer as "engaged in the business of dredging and supervising dredging operations", being a majority stockholder and active head of the "Bowers Southern Dredging Co." and a member of three partnerships in the same line of business. The corporation becoming financially embarrassed and to protect his investments, he endorsed notes for the company because of which he had to pay $68,000 for the company, and in addition sustained other losses on the sale of his stock in the company. The Board of Tax Appeals disallowed his right to deduct these losses in the succeeding years as "net" losses under § 204 of the Revenue Act on the ground that they "did not result from the operation of any trade or business regularly carried on by appellant, but only from 'isolated or occasional trans-

actions' ". In reversing this ruling, the Court of Appeals said (p. 1032):

> "Appellant was engaged in regularly carrying on the business of dredging, operated by a corporation of which appellant was principal owner and active directing head, and to which he devoted all of his time and energies. Appellant accordingly was necessarily concerned with the financial conditions and difficulties which beset the business, and he was compelled by circumstances to indorse the company's notes in order to supply it with necessary operating funds. This action was not isolated or occasional, but became part of the operation of the business, and helped to carry it on. It is true that appellant did not regularly carry on a business of indorsing notes for profit, but his indorsement of the company's notes was part of the business regularly carried on for the company. It is also true that appellant was not regularly engaged in the business of selling corporate stocks, but the transactions of that character appearing in the record cannot be separated from the regular course of business of which they were part, and must be not considered as if wholly independent transactions."

That the *Clark* case is inconsistent with the holding of the Circuit Court of Appeals in the instant case, is conceded by the Solicitor-General, who stated in his Memorandum on the petition for Writ of Certiorari in this case (page 9), that

> "If the principle of that (Clark) case had been followed in the instant case, a different result would doubtless have been reached."

Not only the *Washburn* and *Clark* cases, but the recent decisions of the Board of Tax Appeals all sustain petitioner's contention, differentiating clearly between (1) stock

losses in isolated transactions as not deductible in the following two years, and (2) stock losses sustained in connection with a trade or business regularly carried on by the taxpayer, which are deductible.

Anthony vs. *Comm.*, 20 B. T. A. 5; *Averill* vs. *Comm.*, 20 B. T. A. 1196, 1198, and *Heller* v. *Comm.*, 25 B. T. A. 259, are discussed and their similarity are pointed out by the Court of Appeals in its opinion in *Clark* v. *Burnet* (*supra*).

In the *Anthony* case, the taxpayer was engaged in the retail shoe business, first as one of a partnership, then as a corporate stockholder, and his 1923 stock loss was held deductible as a "net loss" from his 1924 net income.

In the *Averill* case, the taxpayer was interested in many enterprises, all in corporate form and his stock losses in those enterprises were held deductible as operating losses, the opinion in the *Clark* case saying (p. 1032):

> "This is entirely different from the operating loss of the corporation, and must rest upon the ground that investments in such stocks or bonds is a part of, or incident to, the operation of a trade or business regularly carried on by the taxpayer. It is obvious that an individual may suffer a 'net loss' within the meaning of the statute upon the failure of a corporation or a sale or other disposition of his interest therein."

The *Heller* case involved several corporations engaged in retailing ready-to-wear clothing, and the managing stockholders were permitted to deduct under § 206 (a) a loss resulting from the sale of stock in one of the companies.

In *Potter* v. *Commissioner*, 18 B. T. A. 549, the taxpayer operated several hotels, each as a separate corporate entity. He sold his stock in one of the companies at

a loss, the right to deduct which, as a "net loss" the Board sustained, saying (p. 553):

> "In these enterprises he was not a mere investor, but made the business in which his funds were invested the subject of his personal and individual attention and effort, receiving for this a salary in addition to the increase in his return from the investment, due to his knowledge of the business and efficient operation of the various enterprises. The picture presented shows clearly that the investment and the personal management were closely related, each dependent on the other, the two combined producing the income received by this taxpayer, and that the knowledge, experience, work and investment were all in respect to one definite and distinct line of business, namely, hotel organization and operation."

In *Heaslet* v. *Commissioner*, 23 B. T. A. 50, the taxpayer invested $116,000 in securities of a corporation when he became its president and general manager. The loss of this investment was allowed as sustained as a net loss in a business regularly carried on. The opinion says (p. 52):

> "This is not the case of a man making an investment in securities of a corporation conditioned upon his appointment to a salaried executive position. In 1919 petitioner's knowledge of the automotive industry and financial standing was such that he was in a position where he could invest his capital and employ his time in an enterprise of his own selection. This he did by investing his money and taking the controlling executive position * * *. The investment and position were directly related, neither being independent of the other. Managing the affairs of the corporation, with the view of obtaining the largest possible return on his investment in its securities, was the principal busi-

ness of petitioner in and for two years prior to 1921. * * * We think the loss sustained in 1921 was suffered in a business regularly carried on by petitioner. *Elmore L. Potter*, 18 B. T. A. 549; *T. I. Crane*, 17 B. T. A. 720; *E. D. Anthony*, 20 B. T. A. 5; *Lawrence J. Montgomery*, 17 B. T. A. 1308."

Other similar cases are:

Liebes v. *Commissioner*, 23 B. T. A. 787;
Conrades v. *Commissioner*, 21 B. T. A. 213;
Lovering v. *Commissioner*, 21 B. T. A. 1260;
Huxford v. *Commissioner*, 20 B. T. A. 39;
Ostenberg v. *Commissioner*, 17 B. T. A. 738;
Crane v. *Commissioner*, 17 B. T. A. 720;
Montgomery v. *Commissioner*, 17 B. T. A. 1308;
Philip Kobbe Co., Inc., v. *Commissioner*, 4 B. T. A. 663.

In this case, the Circuit Court of Appeals said that Congress did not intend the Statute to apply to occasional or isolated "losses" (R. 133). If by this statement, the court below meant isolated "transactions", then we agree. An isolated "loss" and an isolated "transaction" are not the same. In the first case, the loss may be a single loss in a regular business or trade. In the other case, the loss is not in a regular business or trade, but in a casual venture or single transaction. There is nothing in the Statute, in letter or spirit, which indicates that a loss, to be deductible as a "net loss", must be multiple or repetitious. It is sufficient if there is one loss, provided it is sustained in a trade or business which is regularly carried on. The important feature is that the business should be continuous, although the loss might be single. Where the business is not continuous, even though losses are numerous,

they are not deductible because then they are not sustained in a trade or business regularly carried on by the taxpayer.

This distinction was pointed out in *Harper* v. *Commissioner*, 20 B. T. A. 143, as follows (p. 153):

> "Examination of such cases reveals, however, that they turn upon the fact that the stocks involved were held *for investment*, or were acquired and sold in *purely casual transactions* rather than in the course of a business regularly carried on." (italics ours)

This distinction is recognized too in the *Washburn* case where the court says (page 953):

> "An isolated transaction in itself would not be a business regularly carried on, but it could well be a part of a general business."

And then, the Court continues:

> "A party may have investments in corporate stock, have no particular occupation, and live on the return of his investments. That would not constitute business under the statute in question. He may, however, take such an active part in the management of the enterprise in which he has investments as to amount to the carrying on of a business."

The circumstances under which corporate entity may be disregarded were stated by the Circuit Court of Appeals (R. 133). Such statement has no application to the case at bar. The taxpayers do not seek to disregard the corporate entity of the companies employed by Mr. Dalton. On the contrary, the legal corporate entity of the companies has been respected.

The corporate losses were not the taxpayer's per-

sonal losses. Neither were the corporate profits the taxpayer's personal profits. Mr. Dalton may have sustained a loss in his personal business and in the capital which he employed in using corporations as a part of his personal business, while the corporations received profits. Conversely, Mr. Dalton may have profited from the sale of his stock in the corporation, while the corporation was sustaining an operating loss.

In *Nixon* v. *Lucas*, 42 F. (2nd) 833, three stockholders of a corporation sought to divide among themselves the losses sustained by the corporation during the taxable year, as personal losses, and thereby to "disregard the corporate entity". The Court properly held that this could not be done.

At bar, the taxpayer is not seeking to deduct corporate losses. They are sustained solely by the corporation.

As the Circuit Court of Appeals correctly said (R. 133):

> "This taxpayer did not regard the business losses of the Dalton Manufacturing Corporation as his losses."

Had it been the purpose of the taxpayer to disregard the corporate entity, then the annual gain or loss to the corporation would have been the annual gain or loss to the taxpayer, and the taxpayer would have taken such annual gain or loss in the individual tax return. But the taxpayer did not disregard the corporate entity. He contends that each corporation is a separate entirety to be dealt with as such, receiving its respective annual profits and sustaining its respective annual losses. The corporate entity has not been disregarded but has been kept intact, and the corporate entity, taken as a whole, constitutes a part of the indi-

vidual business of the taxpayer as a whole, just as the corporations in the *Washburn, Clark* and other cases herein cited, constituted a part of the business of those respective taxpayers.

In this case, as well as in other tax cases, the statement of this Court in *U. S.* v. *Phellis,* 257 U. S. 156, 168, is pertinent:

> "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder."

And it must also be remembered that in case of doubt, taxing statutes are construed most strongly against the Government and in favor of the taxpayer.

Gould v. *Gould,* 245 U. S. 153.
Heaslet v. *Commissioner,* 23 B. T. A. 50.
Marston v. *Commissioner,* 18 B. T. A. 558.

Analysis of Authorities Cited by Circuit Court of Appeals.

Goldberg v. *Commissioner,* 36 F. (2d) 551; *Pabst* v. *Lucas,* 36 F. (2d) 614 and *Anderson* v. *U. S.,* 48 F. (2d) 201 are distinguished and shown to have no application, in the opinion of the Court of Appeals in *Clark* v. *Burnet* (*supra*), as follows:

> "The Commissioner cites among others the case of *Goldberg* v. *Commissioner,* 59 App. D. C. 147, 36 F. (2d) 551, where the taxpayer sustained losses in an individual real estate transaction which he later transferred to his real estate corporation; also Pabst *v.* Lucas, 59 App. D. C. 154, 36 F. (2d) 614, where the taxpayer sustained losses in investments wholly foreign

to his regular business. In both cases deductions claimed under section 204, *supra*, were rightly disallowed. These decisions, however, do not serve as authority here. The Commissioner cites also Anderson *v.* United States (C. C. A.) 48 F. (2d) 201 wherein such a deduction was disallowed to a taxpayer who is said to have been 'interested' in certain business enterprises without finding, however, that the business had been regularly carried on by him. The decision as reported is not inconsistent with our conclusion in the present case. Other authorities cited by the Commissioner have been examined by us, but they do not require specific mention here."

In *Nixon* v. *Lucas*, 42 F. (2d) 833, as the Circuit Court of Appeals opinion in the case at bar shows (R. 133) three stockholders of a corporation made a practice of selling in the corporate name, divided among themselves the corporate losses which they claimed as deductions in their personal income tax returns. Those were not personal losses but purely corporate losses. It was in this case that the taxpayers attempted to *disregard* the corporate entity.

Bedell v. *Commissioner*, 30 F. (2d) 622; *Mente* v. *Eisner*, 266 Fed. 161; involved purely isolated investments in no way dependent on or connected with taxpayers' regular business.

In *Phipps* v. *Commissioner*, 54 F. (2d) 469, the taxpayers' activities, the buying and selling of real estate, "were very intermittent", they had not continuously engaged in the development and sale, or purchase of lands, and there was "no activity amounting to a trade or business." In other words, they were isolated transactions, pure and simple.

The cases cited in the second paragraph of the opinion (R. 133) relate to the corporate legal entity doctrine, which is not questioned, but has no application here.

Conclusion.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

ARNOLD LICHTIG,
Counsel for Petitioners.

APPENDIX.

REVENUE ACT OF 1924, c. 234, 43 STAT. 253, 260.

SEC. 206. (*a*) As used in this section the term "net loss" means the excess of the deductions allowed by Section 214 or 234 over the gross income, with the following exceptions and limitations:

(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;

(2) In the case of a taxpayer other than a corporation, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of the capital gains;

* * * * * * * * *

(*b*) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * * * * * *

(U. S. C., Title 26, Sec. 937.)

Treasury Regulations 65, Relating to the Income Tax Under the Revenue Act of 1924

Art. 1621. *Net losses, definition and computation.*—The term "net loss" as used in the statute applies to a net loss during the taxable year in a trade or business regularly carried on by the taxpayer. Included therein are losses from the sale or other disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business. (See article 1654 with reference to the deduction of capital net losses.) In order to be entitled to claim an allowance for a "net loss" the taxpayer must have suffered an actual net loss in a trade or business during the taxable year. * * *

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No 52

In the Supreme Court of the United States

OCTOBER TERM, 1931

HUBERT DALTON AND FLORENCE W. DALTON,
PETITIONERS

v.

FRANK C. BOWERS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES, FOR THE SECOND DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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CITATIONS

Cases:

Clark, R. P. v. *Burnet* (Ct. App. D. C., No. 5386), reported in Prentice-Hall Fed. Tax Service (1932), Vol. 1, p. 1252 — 7, 8, 10

Goldberg v. *Commissioner*, 36 F. (2d) 551 — 6

Hughes v. *Commissioner*, 38 F. (2d) 755 — 6

McCoach v. *Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295 — 6

Washburn v. *Commissioner*, 51 F. (2d) 949 — 6, 7, 10

Statute:

Revenue Act of 1924, c. 234, 43 Stat. 253—
Section 206 (U. S. C., Title 26, sec. 937) — 11

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Treasury Regulations 65—
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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 911

HUBERT DALTON AND FLORENCE W. DALTON, PETITIONERS

v.

FRANK C. BOWERS, AS EXECUTOR OF THE LAST WILL and Testament of Frank K. Bowers, as Collector of Internal Revenue of the United States, for the Second District of New York

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the instant petition.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 86–91) is unreported. The opinion of the Circuit Court of Appeals (R. 189–193) is reported in 56 F. (2d) 16.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 23, 1932. (R. 194.) Petition for rehearing was denied March 14, 1932. (R. 203.) Petition for a writ of certiorari was filed May 2, 1932. While petitioners erroneously refer to Section 347 of the Judicial Code, the jurisdiction of this Court is presumably invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under the circumstances of this case a loss sustained by petitioner Hubert K. Dalton in 1924, when his stock in the Dalton Manufacturing Company became worthless, was a loss "attributable to the operation of a trade or business regularly carried on by the taxpayer" within the meaning of Section 260 (a) (1) of the Revenue Act of 1924.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations are contained in the Appendix, *infra*, pp. 11–13.

STATEMENT

The District Court directed a verdict in favor of petitioners (R. 86–91) upon evidence which may be summarized as follows:

In 1917 (R. 46) petitioner Hubert K. Dalton, an inventor, designer, and engineer (R. 23, 32), and

the owner of certain patents upon his inventions (R. 28, 34, 58, 67, 75, 98), organized the Dalton Manufacturing Corporation under the laws of the State of New York (R. 26), and acquired all of the capital stock of the corporation at a cost of $395,000 (R. 26, 43, 54). He became president and treasurer and a director (R. 26, 48), and assumed control of the corporation (R. 48). He assigned some of his patents to the corporation (R. 29, 48, 58–59, 75, 98), and the corporation took over some of the assets of the Dalton Machine Company upon dissolution of that company in 1917 (R. 46, 49). In organizing the Dalton Manufacturing Corporation it was Dalton's purpose to have the corporation take over, develop, manufacture, and sell the articles invented by him (R. 49, 55–56), with a view to making his patented articles well known to the public and the corporate stock held by him more valuable (R. 33).

During the years 1917 to 1924, inclusive, Dalton was in active charge of the business and affairs of the Dalton Manufacturing Corporation.[1] (R. 48, 51.) He derived some income from other investments owned by himself and his wife. (R. 47.) Although the Dalton Manufacturing Corporation credited Dalton with a salary for the years 1917 to 1922, inclusive, he withdrew no money from the corporation (R. 43), and the corporation at no time made a profit (R. 47).

[1] Dalton spent from eight to ten hours a day at the office of the company during 1923 and five or six hours a day at the office of the company during 1924. (R. 51.)

During the years 1917 to 1923, inclusive, Dalton Manufacturing Corporation manufactured and sold Dalton lathes and other articles covered by Dalton's inventions (R. 27, 50), and also purchased and sold dogs, chocks, and collets to be used in connection with the Dalton lathes (R. 57), but the latter amounted to less than 1 per cent of the corporation's business. (R. 27, 57.)

Between 1917 and 1922, inclusive, Dalton loaned to Dalton Manufacturing Corporation $436,179.30 (R. 41–42), no part of which was ever paid (R. 57). During 1923 and 1924 he advanced an additional $72,569.83. (R. 38.)

In 1923 the corporation ceased active business operations and took steps to wind up its business. (R. 130.) At the close of 1923 its liabilities exceeded its assets by $176,462.01. (R. 131.)

In a joint return for 1923 Dalton and his wife claimed a deduction of $157,035.50 as a bad debt owing Dalton by the Dalton Manufacturing Corporation. (R. 129–130.) The assets of the corporation were disposed of in 1924 (R. 71, 74, 77) at a price which was less than the corporate liabilities (R. 41, 78–79). The corporation was formally dissolved in 1925. (R. 41, 46.)

In a joint income-tax return for the year 1925 Dalton and his wife claimed a deduction of $395,000, representing the cost of the Dalton Manufacturing Corporation stock. (R. 6, 7, 101, 102.) The Com-

missioner of Internal Revenue disallowed the deduction for the year 1925 (R. 7, 14), but held that the loss was sustained in 1924 and adjusted Dalton's taxes for that year accordingly (R. 10). He determined a deficiency for the year 1925 in the sum of $56,841.32 (R. 11, 20), which was paid under protest (R. 12, 15).

Suit was instituted in the District Court for the Southern District of New York (R. 4) to recover on one of two alternative causes of action (R. 22). The first cause of action (R. 4–9) was based upon the claim that the loss was sustained in 1925 and that, therefore, the Commissioner's determination of the deficiency for that year was erroneous. The second cause of action (R. 9–13) was based upon the theory that if the loss was sustained in 1924 petitioners had a net loss for that year of $374,078.98 which they were entitled to carry forward and deduct from their 1925 income of $291,702.31 as determined by the Commissioner, thus entitling them to a return of the $56,841.32 paid under protest as above stated. By stipulation the case was tried to a jury of one (R. 21–22), each side moving for a directed verdict at the close of the trial (R. 85). The District Court granted petitioners' motion for a directed verdict and in its opinion (R. 86–91) held that even though the loss was sustained in 1924, as determined by the Commissioner, it was nevertheless "incurred in a trade or business regularly carried on by the taxpayer in 1924" (R. 89), and

thus could, in part, be carried forward under the provisions of Section 206 (b) of the Revenue Act of 1924 (*infra*, p. 11), and accordingly entered judgment for the petitioners (R. 18–20).

The Collector appealed to the Circuit Court of Appeals for the Second Circuit (R. 181), where, reversing the judgment of the District Court it was held that the loss was sustained in 1924 (R. 193); that the Dalton Manufacturing Corporation was a legal entity, separate and distinct from Dalton, its stockholder, and that inasmuch as Dalton chose to do business through the corporation his loss was a capital loss and "did not occur in the operation of the trade or business regularly carried on by" him (R. 191).

Petitioners seek to have this Court review the decision of the court below, holding that the loss of $395,000 was not sustained in the operation of a trade or business regularly carried on by petitioner Hubert K. Dalton.

DISCUSSION

While the decision of the Circuit Court of Appeals is in accordance with well-established principles of law (*Goldberg* v. *Commissioner* (App. D. C.), 36 F. (3d) 551; *Hughes* v. *Commissioner* (C. C. A. 10th), 38 F. (2d) 755; *McCoach* v. *Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295, 306), it nevertheless seems to be in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Washburn* v. *Commissioner*, 51

F. (2d) 949, and with that of the Court of Appeals of the District of Columbia in *R. P. Clark* v. *Burnet*, No. 5386, decided April 11, 1932, not yet officially reported but to be found in Prentice-Hall Fed. Tax Service (1932), Vol. 1, p. 1252.

In *Washburn* v. *Commissioner, supra,* Washburn devoted his entire time to supervising the business of several corporations, including four lumber companies in which he was heavily interested. In order to facilitate the operations of one of the lumber companies he organized a railroad company, became its principal stockholder and managed its affairs. In 1922 he sold his stock in the railroad company at a loss, and the court held that the railroad company was not a separate and distinct enterprise but that it was organized and the road constructed as an aid to Washburn's timber-holding companies; that it was a part of the general enterprise; and that "It was merely the alter ego of petitioner." (P. 953.) It concluded (p. 955) that the loss sustained by Washburn upon the sale of his railroad company stock in 1922 resulted from the operation of a "trade or business regularly carried on by" the taxpayer within the meaning of Section 204 (a) of the Revenue Act of 1921 and reversed a contrary decision of the Board of Tax Appeals. While the court below thought that the *Washburn* case was "perhaps" distinguishable (R. 193) it seems reasonably clear that there is no such fundamental difference in the facts of the two cases as to justify a different result if the same rule were applied to both.

In *R. P. Clark* v. *Burnet, supra,* Clark held a majority of the stock and was the acting head of a corporation engaged in the dredging business. He was also a member of three different partnerships, two of which were engaged in the dredging business and one in river and harbor works and jetty building. The work of the partnerships was closely allied with that of the corporation and Clark took an active advisory interest in the partnership activities. The corporation experienced financial difficulties in 1921 and in order to protect his investment in the company Clark at various times became endorser upon the company's notes. As a result of such endorsements he was forced to pay the sum of $68,000 for the company in 1921. During that year he also sustained a loss of $9,500 on the sale of some of the company's stock. Those losses when added to his other deductions exceeded his gross income for 1921. In 1922, being desirous of having someone of financial strength associated with him in the corporation, Clark sold 1,000 shares of corporate stock which had cost him $100,000 for $7,500. In his return for 1922 he was allowed a deduction of the resultant loss of $92,500. However, the $92,500 when added to other deductions allowed by law for the year 1922 exceeded his gross income. Clark claimed the right to carry the unabsorbed losses of 1921 and 1922 forward to the year 1923 as a "net loss." The Board of Tax Appeals held that the loss was sustained in a capital transaction and

not in the operation of a trade or business. The Court of Appeals of the District of Columbia held (p. 1253) that Clark "was engaged in regularly carrying on the business of dredging, operated by a corporation of which appellant was principal owner and active directing head, and to which he devoted all of his time and energies." It accordingly reversed the decision of the Board of Tax Appeals and held that the loss sustained by Clark in the purchase and sale of the corporate stock resulted from the operation of a trade or business regularly carried on by Clark, within the meaning of Section 204 of the Revenue Act of 1921.

It will be observed that the court disregarded the corporate fiction and held that Clark was engaged in the business carried on by the corporation. If the principle of that case had been followed in the instant case a different result would doubtless have been reached.

There are many cases now pending in the courts, before the Board of Tax Appeals, and before the Commissioner of Internal Revenue involving facts substantially similar to those in the instant case and thus raising the question whether losses incurred as a creditor or a stockholder of a corporation by a taxpayer who is actively engaged in the management of the incorporated business enterprise are deductible "net losses" within the meaning of the applicable Revenue Acts. It is therefore important to the Government and taxpayers generally that the law should be settled. The facts in the

the Commissioner with the approval of the Secretary.

* * * * *

(U. S. C., Title 26, Sec. 937.)

Treasury Regulations 65, Relating to the Income Tax Under the Revenue Act of 1924

ART. 1621. *Net losses, definition, and computation.*—The term "net loss" as used in the statute applies to a net loss during the taxable year in a trade or business regularly carried on by the taxpayer. Included therein are losses from the sale or other disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business. (See article 1654 with reference to the deduction of capital net losses.) In order to be entitled to claim an allowance for a "net loss" the taxpayer must have suffered an actual net loss in a trade or business during the taxable year. The amount properly allowed may be neither the loss reflected by the return filed for the purpose of the income tax nor the net loss shown by the taxpayer's profit and loss account, but is to be computed according to the statute, as follows:

(1) In the case of an individual it is the amount by which the deductions allowed under section 214, excluding:

(*a*) the amount by which the deductions otherwise allowed by law but not attributable to the operation of a trade or business regularly carried on by the taxpayer exceed the amount of gross income not derived from such trade or business;

(*b*) the amount by which the deductions for capital losses otherwise allowed by law exceed the capital gains; and

(*c*) the amount by which the deduction for depletion exceeds the amount which would be allowable if computed without reference to discovery value,

exceeds the sum of the following:

(*a*) the gross income of the taxpayer for the taxable year as computed under section 213; and

(*b*) the amount by which the interest received free from taxation under Title II of this Act exceeds the amount of interest paid or accrued which is not allowed as a deduction by section 214 (a) (2);

* * * * *

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No. 52

In the Supreme Court of the United States

OCTOBER TERM, 1932

HUBERT DALTON AND FLORENCE W. DALTON,
PETITIONERS

v.

FRANK C. BOWERS, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF FRANK K. BOWERS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 66–69) is unreported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 130–135) is reported in 56 F. (2d) 16.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 23, 1932. (R. 135.) Petition for a rehearing was denied March 14, 1932.

(R. 135–136.) Petition for a writ of certiorari was filed May 2, 1932, and granted May 31, 1932. (R. 136.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the circumstances of this case, a loss sustained by Hubert Dalton in 1924, when his stock in the Dalton Manufacturing Company became worthless, was a loss "attributable to the operation of a trade or business regularly carried on by the taxpayer" within the meaning of Section 206 (a) (1) of the Revenue Act of 1924.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations are set forth in the Appendix, *infra,* pp. 16–18.

STATEMENT

The District Court directed a verdict in favor of petitioners (R. 69) upon evidence which may be summarized as follows:

In 1917 (R. 34) petitioner Hubert Dalton, an inventor, designer, and engineer (R. 14, 22), and the owner of certain patents upon his inventions (R. 19, 24, 44, 57, 76–77) organized the Dalton Manufacturing Corporation under the laws of the State of New York (R. 17), and acquired all of the capital stock of the corporation at a cost of $395,000 (R. 17, 32–33, 41). He became president and treasurer and a director (R. 17, 36) and assumed con-

trol of the corporation (R. 36). He assigned some of his patents to the corporation (R. 20, 36, 44, 57, 76–77), and the corporation took over some of the assets of the Dalton Machine Company upon dissolution of that company in 1917 (R. 34–35, 37). In organizing the Dalton Manufacturing Corporation it was Dalton's purpose to have the corporation take over, develop, manufacture, and sell the articles invented by him (R. 37, 42), with a view to making his patented articles well known to the public and the corporate stock held by him more valuable (R. 23).

During the years 1917 to 1924, inclusive, Dalton was in active charge of the business and affairs of the Dalton Manufacturing Corporation.[1] (R. 36.) He derived some income from other investments owned by himself and his wife. (R. 35.) Although the Dalton Manufacturing Corporation credited Dalton with a salary for the years 1917 to 1922, inclusive, he withdrew no money from the corporation (R. 32), and the corporation at no time made a profit (R. 35).

During the years 1917 to 1923, inclusive, Dalton Manufacturing Corporation manufactured and sold Dalton lathes and other articles covered by Dalton's inventions (R. 18, 37), and also purchased and sold dogs, chocks, and collets to be used in connection with the Dalton lathes (R. 43), but the lat-

[1] Dalton spent from eight to ten hours a day at the office of the company during 1923 and five or six hours a day at the office of the company during 1924. (R. 39.)

ter amounted to less than 1 per cent of the corporation's business (R. 18, 43). Between 1917 and 1922, inclusive, Dalton loaned to Dalton Manufacturing Corporation $436,179.30 (R. 31), no part of which was ever repaid (R. 43). During 1923 and 1924 he advanced an additional $72,569.83. (R. 28.) In 1923 the corporation ceased active business operations and took steps to wind up its business. (R. 100.) At the close of 1923 its liabilities exceeded its assets by $176,462.01. (R. 101.)

In a joint return for 1923 Dalton and his wife claimed a deduction of $157,035.50 as a bad debt owing Dalton by the Dalton Manufacturing Corporation. (R. 100.) The assets of the corporation were disposed of in 1924 (R. 53–54, 56, 58) at a price which was less than the corporate liabilities (R. 30–31, 59–60). The corporation was formally dissolved in 1925. (R. 30.)

In a joint income-tax return for the year 1925 Dalton and his wife claimed a deduction of $395,000 representing the cost of the Dalton Manufacturing Corporation stock. (R. 4, 79, 80.) The Commissioner of Internal Revenue disallowed the deduction for the year 1925 (R. 4, 9), but held that the loss was sustained in 1924 and adjusted Dalton's taxes for that year accordingly (R. 6). He determined a deficiency for the year 1925 in the sum of $56,841.32 (R. 7, 14), which was paid under protest.

Suit was instituted in the District Court for the Southern District of New York (R. 2) to recover on one of two alternative causes of action (R. 14).

The first cause of action (R. 2–5) was based upon the claim that the loss was sustained in 1925 and that, therefore, the Commissioner's determination of the deficiency for that year was erroneous. The second cause of action (R. 6–9) was based upon the theory that if the loss was sustained in 1924 petitioners had a net loss for that year of $374,078.98 which they were entitled to carry forward and deduct from their 1925 income of $291,702.31 as determined by the Commissioner, thus entitling them to a return of the $56,841.32 paid under protest as above stated. By stipulation the case was tried to a jury of one (R. 13), each side moving for a directed verdict at the close of the trial (R. 65). The District Court granted petitioners' motion for a directed verdict (R. 69) and in its opinion (R. 66–69) held that even though the loss was sustained in 1924, as determined by the Commissioner, it was nevertheless "incurred in a trade or business regularly carried on by the taxpayer in 1924" (R. 68), and thus could, in part, be carried forward under the provisions of Section 206 (b) of the Revenue Act of 1924 (*infra*, p. 16), and accordingly entered judgment for the petitioners (R. 11–12).

The Collector appealed to the Circuit Court of Appeals for the Second Circuit (R. 127), where, reversing the judgment of the District Court, it was held that the loss was sustained in 1924 (R. 135); that the Dalton Manufacturing Corporation was a legal entity, separate and distinct from Dalton, its stockholder, and that inasmuch as Dalton

chose to do business through the corporation his loss "did not occur in the operation of the trade or business regularly carried on by" him (R. 132). This Court granted certiorari. (R. 136.)

SUMMARY OF ARGUMENT

The right to carry a deduction forward from 1924 to 1925 is limited by Section 206 of the Revenue Act of 1924 (*infra*, p. 16) to losses "attributable to the operation of a trade or business regularly carried on by the taxpayer."

Hubert Dalton, one of the taxpayers herein, purchased all of the stock of Dalton Manufacturing Corporation in 1917 for $395,000, and this investment resulted in a total loss in 1924 when the stock became worthless. Dalton was not engaged in the business of dealing in corporate stocks. While he owned all of the stock of the Dalton Manufacturing Corporation and managed its business for his own benefit, the corporate business was not his business. Nor can a loss incurred in the sale of corporate stock be regarded as a loss attributable to the business carried on by the corporation. Losses from investment in the stock of a corporation are in no sense incurred in the business conducted by the corporation. They are losses of the investor incurred when the stock is sold or, as in this case, when the corporation has ceased business and disposed of all its property. It therefore follows that the loss was the result of an isolated capital transaction and was not "attributable to the

operation of a trade or business regularly carried on by" Dalton.

Furthermore, if the corporation was but the "alter ego" of Dalton, as held by the District Court (R. 68), and the losses suffered are attributable to the business carried on by the petitioner in the name of the corporation, the losses incurred were deductible as and when they occurred in the course of the business in each of the years 1917 to 1924, inclusive, and can not be claimed in 1924 when the stock became worthless.

ARGUMENT

Petitioners seek a deduction in 1925 of a loss sustained in 1924. To prevail they must be able to point to a specific provision of the statute permitting the deduction and must bring themselves within its terms. *Woolford Realty Co.* v. *Rose*, 286 U. S. 319. The only authority to carry forward a deduction from 1924 to 1925 is found in Section 206 of the Revenue Act of 1924 (*infra*, p. 16), subdivision (b) of which authorizes the carrying forward from one year to another of a "net loss," and subsection (a) provides:

> As used in this section the term "net loss" means the excess of the deductions allowed by section 214 or 234 over the gross income, with the following exceptions and limitations:
>
> (1) Deductions otherwise allowed by law *not attributable to the operation of a trade*

> *or business regularly carried on by the taxpayer* shall be allowed only to the extent of the amount of the gross income not derived from such trade or business. (Italics ours.)
>
> * * * * *

Thus it will be seen that the statute limits the losses that may be carried forward to those "attributable to the operation of a trade or business regularly carried on by the taxpayer."[2] Therefore, the question here presented is whether the loss sustained by Hubert Dalton in 1924 when his stock in the Dalton Manufacturing Corporation became worthless was "attributable to the operation of a trade or business regularly carried on by" him. If it was not, the only use which could have been made of the deduction was against income in 1924 and it could not have affected the petitioner's tax liability for 1925.

Hubert Dalton acquired all of the capital stock of the Dalton Manufacturing Corporation in 1917

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[2] The purpose of the provision referred to was described by the court below as follows (56 F. (2d) 16, 18):

"By the statute, allowing the deductions and carrying over the loss for two years, Congress intended to give relief to persons engaged in an established business for losses incurred during a year of depression in order to equalize taxation in the two succeeding and more profitable years. It was not intended to apply to occasional or isolated losses. Congress had made this distinction. *Anderson* v. *U. S.*, 48 Fed. (2) 201 (C. C. A. 5); *Pabst* v. *Lucas*, 36 Fed. (2) 614 (Ct. App. D. C.); *DeHaven Mfg. Co.* v. *U. S.*, 31 Fed. (2) 999. * * *"

A similar view of the purpose of the statute was expressed in *Anderson* v. *United States*, 48 F. (2d) 201 (C. C. A. 5th).

at a cost of $395,000, and this investment resulted in a total loss in 1924. There is no suggestion that Dalton was engaged in the business of buying and selling stock, and it is well settled that a single isolated transaction does not constitute a trade or business regularly carried on. *Cooper Manufacturing Co.* v. *Ferguson,* 113 U. S. 727, 734; *Bedell* v. *Commissioner,* 30 F. (2d) 622, 624 (C. C. A. 2d); *Phipps* v. *Commissioner,* 54 F. (2d) 469, 471 (C. C. A. 2d).

While Dalton owned all of the stock of the Dalton Manufacturing Corporation, managed its affairs, and operated its business for his own benefit, nevertheless, upon settled principles, the corporation was a separate and distinct *taxable* entity, and the fact that all of the corporate stock was owned by Dalton does not justify disregard of the corporate entity for tax purposes. The decisions holding that corporate entities are not to be disregarded for tax purposes and the principles upon which those decisions are based are fully discussed in Point I of the Government's brief in *Burnet, Commissioner* v. *Commonwealth Improvement Co.*, No. 95, October Term, 1932, at pp. 7–21. Accordingly, we respectfully refer to that discussion for purposes of this case also. It follows from these principles that if the corporation in the instant case sustained a loss it can not be treated as the stockholder's loss, and if the loss was sustained in a business regularly carried on by the corporation such loss can not be

regarded as having been sustained in a business regularly carried on by the petitioner.

Although Dalton was credited with a salary as president of the corporation and would have received any dividends which the corporation might have paid, neither the earning of a salary (*Hughes* v. *Commissioner* (38 F. (2d) 755, 759 (C. C. A. 10th)) nor the receipt of dividends (*McCoach* v. *Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295) constitutes the "operation of a trade or business."

The statute excludes from the computation of "net loss" losses not attributable to the operation of the trade or business "regularly carried on by the taxpayer," and so the petitioner asserts, in effect, that the business carried on in the name of the corporation was his personal business, that the corporation was merely an instrument or at most his "alter ego," and that its legal existence should be disregarded. The authorities seem to dispose of this contention, but if it were well founded it would still be quite impossible to regard the loss incurred in 1924, when the stock became worthless, as a loss attributable to the carrying on of the petitioner's business. The fact that the stock became worthless in 1924 was not due to any sudden catastrophe to the corporation, but was a result of a long period of unsuccessful operation of the corporate business. While from the point of view of the petitioner as a stockholder the worthlessness of the stock may be regarded as having been finally determined in

1924, from the point of view of the corporation it was only a result of the losses sustained in prior years. Those losses were deductible as they occurred and could not have been deducted in their entirety in 1924. In view of the treatment of his relations with the corporation in prior years, it would be entirely inconsistent to regard the business of the corporation in 1924 as the petitioner's own business. If it was his own business, dividends declared could not have been included in Dalton's gross income, as required by Section 2 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 757), Section 216 of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1062) and 1921 (c. 136, 42 Stat. 227, 242).[8]

Similarly, the deduction of $157,035.50 as a bad debt due from the corporation in 1923 (R. 100) should not have been allowed, for Dalton could not have been both debtor and creditor. The petitioner did not claim as his own the business losses sustained in carrying on the business from year to year, as he logically should have done if he is to be regarded as having carried on the business. If such losses had been claimed, there would have been no loss to deduct in 1924. The petitioner claims only the loss suffered in 1924 when his stock in the corporation finally became worthless. Having destroyed the corporate fiction to bring himself within the statute as the proprietor of the business, he asserts the right to restore it to preserve

[8] See *Eisner* v. *Macomber*, 252 U. S. 189, 213.

his status as a stockholder so as to throw the loss into the year 1924 in which none of the losses incurred in carrying on the business are shown to have been sustained. He can not thus play fast and loose, even with a "fiction" of the law. If he is to be regarded as the proprietor of the business, his losses were sustained prior to 1924. If he is to be regarded as a stockholder in the corporation, his loss was not attributable to a business carried on by him and thus could not be made the basis of a net loss to be carried forward from 1924 to 1925.

While at pages 3 and 6 of their brief petitioners refer to six other corporations organized and operated by Dalton, it is to be noted that the Dalton Manufacturing Company was the only corporation in which Dalton is shown to have been interested between 1917 (R. 34) and 1924 or 1925 (R. 18), the period here involved.

Petitioners assert that they do not seek to disregard the corporate entity of the Dalton Manufacturing Company, but that the corporate entity "taken as a whole was an instrument used by Dalton in furtherance of his own personal business." (Br. 6.) Obviously, a corporation could be used as "an instrument" only by constituting it an agent. There is nothing to indicate that the Dalton Manufacturing Company ever purported to act as the agent of Dalton. In fact, the record discloses the exact reverse. Dalton as president, treasurer, and director of the corporation was the agent (instrumentality) through which the corporation acted.

His acts performed in the regular course of business were the acts of the corporation unless the corporate entity is disregarded. The corporation's acts were not his and the corporation was a "taxpayer" regularly carrying on its own business.

It is contended (Br. 9) that the taxpayer's trade or business was not merely that of inventing, that it included the exploiting of those inventions and putting them on a paying basis, by developing, manufacturing, improving, and selling the patented articles, putting them on the market. The difficulty with this position is that it confuses Dalton's business with that of the corporation. Dalton, as an individual, invented and perhaps improved upon his inventions. The loss which he sustained when his stock became worthless was not attributable to such activity. It was the corporation that developed, manufactured, and placed the patented articles upon the market. Thus, if Dalton's business had ever been that of developing, manufacturing, improving, and selling his inventions, it ceased to be his business when the Dalton Manufacturing Company took over that part of his operations. In effect, he went out of that kind of business and the corporation went into it. Losses incurred in the business which Dalton had parted with were incurred by the corporate taxpayer in prior years and the loss on his stock was not attributable to a business regularly carried on by him as a taxpayer. Only by regarding the corporation's business as Dalton's business can it be said that he incurred a

loss in a business carried on by him. Such a view erroneously treats losses incurred in the course of a business regularly carried on as incurred when the business was terminated. The Revenue Acts treat corporations and individuals as having separate entities as taxpayers. The petitioner's argument upsets the whole scheme of these statutes.

It necessarily follows that Dalton's loss was "not attributable to the operation of a trade or business regularly carried on by" *him* within the meaning of Section 206 (a) (1). Therefore, such loss was not to be taken into consideration in computing the net loss which petitioners were entitled to carry forward from 1924 to 1925 under the provisions of Section 206 (b). *Goldberg* v. *Commissioner*, 36 F. (2d) 551 (App. D. C.); *Anderson* v. *United States*, 48 F. (2d) 201 (C. C. A. 5th). When the loss was used as a deduction against income for 1924 it had served its purpose and nothing remained which could be carried forward. It was, therefore, one of the losses under Section 214 of the Revenue Act of 1924 which could not be used in computing a postponable "net loss" under Section 206.

It is conceded that the decision herein is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Washburn* v. *Commissioner*, 51 F. (2d) 949, and the Court of Appeals for the District of Columbia in *Clark* v. *Burnet*, 59 F. (2d) 1031, pending in this Court on certiorari, No. 180, present term. However, it is our contention that those decisions are unsound in principle

and disregard corporate entities in violation of fundamental and well-established principles of law and that they should not be followed.[4]

CONCLUSION

The decision of the Circuit Court of Appeals is in accordance with well established principles of law and should be affirmed.

Respectfully submitted.

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OCTOBER, 1932.

[4] For an analysis of the decision in the *Washburn* and *Clark* cases, see Memorandum for the Respondent (pp. 7–10) filed in answer to petition for certiorari herein.

APPENDIX

REVENUE ACT OF 1924, C. 234, 43 STAT. 253, 260

SEC. 206. (a) As used in this section the term "net loss" means the excess of the deductions allowed by section 214 or 234 over the gross income, with the following exceptions and limitations:

(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;

(2) In the case of a taxpayer other than a corporation, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of the capital gains;

* * * * *

(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations

prescribed by the Commissioner with the approval of the Secretary.

* * * * * *

[U. S. C., Title 26, Sec. 937.]

TREASURY REGULATIONS 65, RELATING TO THE INCOME TAX UNDER THE REVENUE ACT OF 1924

ART. 1621. *Net losses, definition, and computation.*—The term "net loss" as used in the statute applies to a net loss during the taxable year in a trade or business regularly carried on by the taxpayer. Included therein are losses from the sale or other disposition of real estate, machinery, and other capital assets used in the conduct of such trade or business. (See article 1654 with reference to the deduction of capital net losses.) In order to be entitled to claim an allowance for a "net loss" the taxpayer must have suffered an actual net loss in a trade or business during the taxable year. The amount properly allowed may be neither the loss reflected by the return filed for the purpose of the income tax nor the net loss shown by the taxpayer's profit and loss account, but is to be computed according to the statute, as follows:

(1) In the case of an individual it is the amount by which the deductions allowed under section 214, excluding—

(a) the amount by which the deductions otherwise allowed by law but not attributable to the operation of a trade or business regularly carried on by the taxpayer exceed the amount of gross income not derived from such trade or business;

(b) the amount by which the deductions for capital losses otherwise allowed by law exceed the capital gains; and

(c) the amount by which the deduction for depletion exceeds the amount which would be allowable if computed without reference to discovery value,

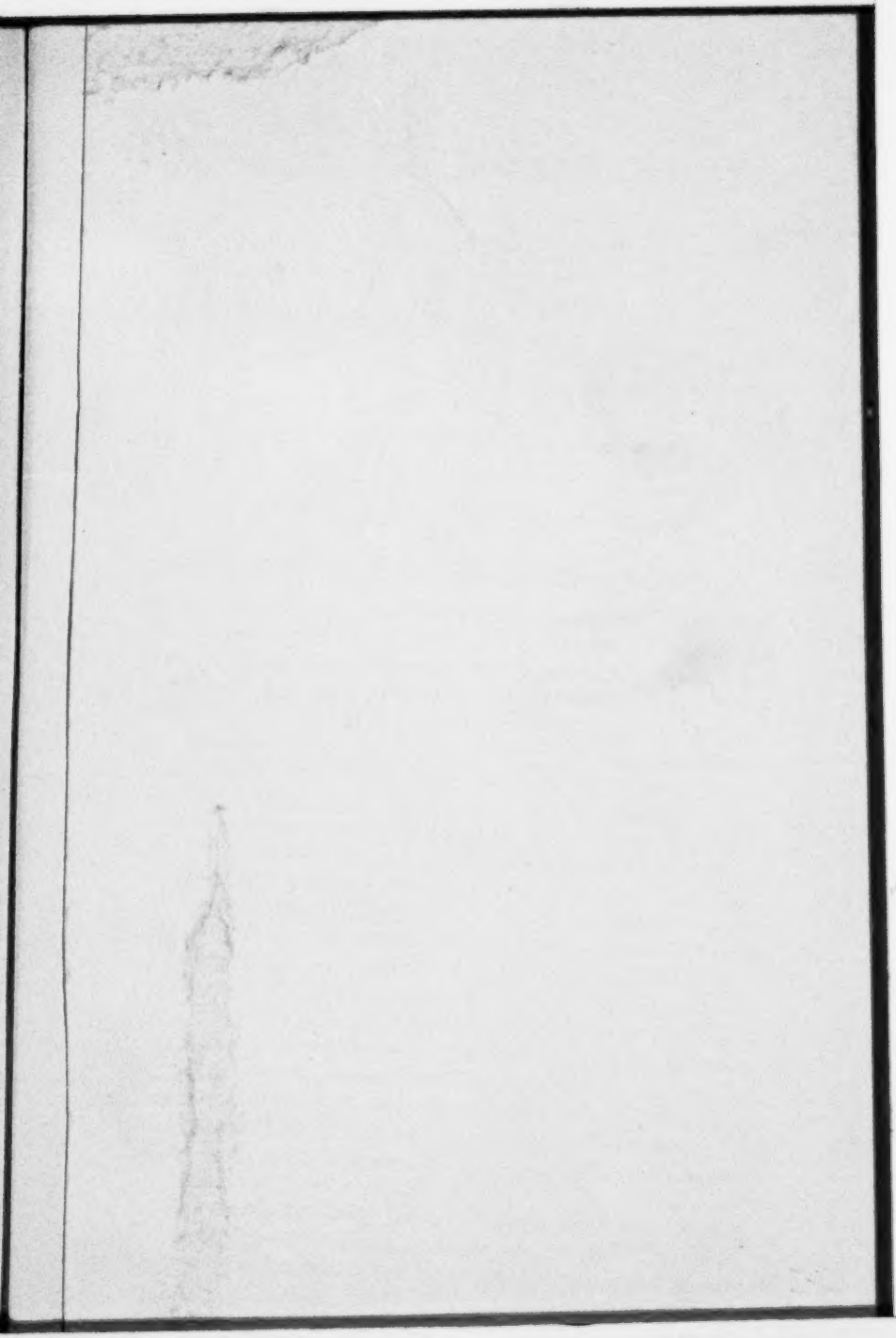
exceeds the sum of the following:

(a) the gross income of the taxpayer for the taxable year as computed under section 213; and

(b) the amount by which the interest received free from taxation under Title II of this Act exceeds the amount of interest paid or accrued which is not allowed as a deduction by section 214 (a) (2);

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1938



SUPREME COURT OF THE UNITED STATES.

No. 52.—October Term, 1932.

Hubert Dalton and Florence W. Dalton, Petitioners,
vs.
Frank C. Bowers, as Executor of the Last Will and Testament of Frank K. Bowers, etc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 12, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

For twenty-five years petitioner Dalton has busied himself with physical research and invention; he has devised and patented hundreds of articles. A large income from sundry sources has enabled him to lay out considerable sums in connection with his inventions; the inventions brought in no net profit after 1914. During the five years following 1912 he caused the organization of six separate corporations and transferred to each certain patents for exploitation. The last of these—the Dalton Manufacturing Corporation—was incorporated under the laws of New York in 1917; he paid for all the capital stock—$395,000.00; became a director, president, treasurer and controlled its affairs. No other person was financially interested. He testified that his primary purpose in this venture was to perfect his sundry models and patented articles and sell the corporate shares profitably; he thought it would be better to market such articles through the corporation, to have the business in corporate form; he considered the corporation as a branch or part of his own business as an inventor and dealer in patents, etc.—as a means to an end, an instrumentality of his purpose. Also, that he believed it essential thus to have his inventions manufactured and brought before the public; the corporations were used in order to develop and improve his inventions.

The Manufacturing Corporation promptly took over certain Dalton patents, manufactured the articles and sought to sell them. The petitioner endeavored to sell the corporate shares and thereby

to obtain gain. From time to time he advanced large sums to pay debts and carry on the corporate business. These loans appeared on the books, but were not repaid. For six years credits were placed to his salary account; he withdrew nothing. In 1924 the Corporation became hopelessly insolvent and during 1925 passed out of existence. The evidence indicates losses during several preceding years. All creditors were paid by petitioner.

The Corporation and Dalton made separate returns for Federal income taxes. In 1923 and 1924 he claimed large deductions—$157,035.50 and $162,309.24—on account of bad debts due from it.

In their joint income return for 1925 Dalton and his wife claimed a deduction of $395,000—the full amount paid for the then worthless shares of the Manufacturing Corporation. The Commissioner ruled that this loss occurred in 1924. Adjustments for that year showed $374,000.00 net loss by the Daltons. The Commissioner refused to apply this upon their 1925 return because not attributable to the operation of a trade or business regularly carried on by the taxpayer. If so applied, there would have been no taxable income for that year. Payment of $56,841.32 was demanded and made under protest. This suit to recover followed.

Petitioners maintain that the $395,000.00 loss, adjudged by the Collector to have occurred in 1924, was sustained in a trade or business regularly carried on by Mr. Dalton; consequently, the net loss for that year—$374,078.98—should have been deducted from the 1925 income under terms of the Revenue Act of 1924, Sec. 206 (a) and (b), and Treasury Regulations 65, Article 1621. The District Court accepted their view; the Circuit Court of Appeals held otherwise.

The latter court said—

> "There is no justification for saying that the business of the corporation was that of the appellee. During the period the appellee dealt with the corporation as an entity. When he paid the debts of the corporation, he drew on his personal account in favor of the corporation's account and this made the corporation his debtor. Separate tax returns were filed by the corporation and by the appellee. He purchased the capital stock with the intention of disposing of it to the public. His individual time was spent in large part in matters of invention. . . . The loss now sought to be deducted

was an investment which he made in the corporation and did not occur in the operation of the trade or business regularly carried on by the appellee. . . .

"By the statute, allowing the deductions and carrying over the loss for two years, Congress intended to give relief to persons engaged in an established business for losses incurred during a year of depression in order to equalize taxation in the two succeeding and more profitable years. It was not intended to apply to occasional or isolated losses. . . .

"This taxpayer did not regard the business losses of the Dalton Manufacturing Company as his loss. The loss sustained by the appellee which he seeks to charge off is a capital investment loss. The rule is well settled that the corporation will be looked upon as a legal entity. . . ."

We agree with the conclusion of the Circuit Court of Appeals and its judgment must be affirmed.

The Revenue Act of 1924, c. 234, 43 Stat. 253, 260, (U. S. C., Title 26, Sec. 937), provides—

"Sec. 206. (a) As used in this section the term 'net loss' means the excess of the deductions allowed by section 214 or 234 over the gross income, with the following exceptions and limitations:

"(1) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall be allowed only to the extent of the amount of the gross income not derived from such trade or business;

"(2) In the case of a taxpayer other than a corporation, deductions for capital losses otherwise allowed by law shall be allowed only to the extent of the capital gains; . . .

"(b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called 'second year'), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called 'third year'); the deduc-

tion in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary."

In the courts below the petitioners unsuccessfully insisted that the loss upon sale of the corporate shares occurred in 1925 and should be offset against gains received during that year. Here that insistence is not renewed.

The claim of right to offset the net loss of 1924 against 1925 gains cannot prevail unless the requirements of the quoted section, Revenue Act of 1924, are met—the loss must have been "attributable to the operation of a trade or business regularly carried on by the taxpayer."

In support of their position petitioners say—

The losses of the Manufacturing Corporation were not the losses of the taxpayers. They do not seek to disregard the corporate entity, but respect it. Taken as a whole this entity constituted a part of the individual trade or business of Hubert Dalton. His trade or business was not merely that of inventing; it included exploiting of his inventions, putting them on a paying basis by developing, manufacturing, improving and selling them through corporations organized for that special purpose. All of these things formed a complete, comprehensive enterprise of which the Corporation was part. It was an instrumentality of the taxpayer's business. Consequently, the investment in the corporate shares was part of business regularly carried on.

Whether theoretically valid or not, this argument rests upon assumptions out of harmony with the facts disclosed by the record. Dalton was not regularly engaged in the business of buying and selling corporate stocks. He organized the Manufacturing Corporation and took over all its shares with the intention of selling them at a profit. He treated it as something apart from his ordinary affairs, accepted credits for salaries as an officer, claimed loss to himself because of loans to it which had become worthless, and caused it to make returns for taxation distinct from his own. Nothing indicates that he regarded the corporation as his agent with authority to contract or act in his behalf. Ownership of all the stock is not enough to show that creation and management of the corporation was a part of his ordinary business. Certainly, under the general rule for tax purposes a corporation is an entity distinct from its stockholders, and the circumstances here are not so unusual as to create an exception.

Affirmed.